IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-621/18

WIGHTMAN AND OTHERS

WRITTEN OBSERVATIONS OF THE UNITED KINGDOM

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A. Introduction

1. The Inner House of the Court of Session ("**the Referring Court**") has posed the following three questions ("**the Questions**") to this Court:

> "***[1]*** *Where, in accordance with Article 50 of the TEU, 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,* ***[2]*** *subject to what conditions and* ***[3]*** *with what effect relative to the Member State remaining within the EU*".

2. It is certainly a set of questions that has excited and interested not only the Petitioner politicians that have instigated the reference but also legal academics, which is fitting since the questions are presently entirely academic. To show why the posing of the Questions is flawed and to identify the issue of principle at the heart of the United Kingdom's objection to admissibility, it is helpful to state the problem at the highest level of generality before proceeding to identify how, if at all, the particular subject-matter namely the interpretation of Article 50 TEU alters the analysis.

3. Looked at objectively the Referring Court has decided two things:

   a. First, it has concluded that as a matter of Scots law it can provide, by means of a declarator, what is in effect an advisory opinion (though it does not style it as such), or "guidance" as the Petitioners repeatedly style it (see §2.9 and 2.10 of the Petitioners' Note, at Appendix 1), on the proper construction of a legal provision and the effects of acts done under it since that advisory opinion may be of relevance to how elected representatives (principally members of national, devolved and Union Parliaments) approach the discharge of their political functions and evaluate political options and thus inform a live political debate.

   b. Secondly, since the topic of legal investigation by such advisory opinion is the proper construction of an Article of the TEU (with consequential questions as to the EU law effects of Member State action taken pursuant to that Article), it has decided that such advisory opinion raises a question of EU law that should be referred to this Court pursuant to Article 267 TFEU since only here can it be conclusively answered.

4. So ignoring for now the Article 50 TEU context, the combined effect of these steps, if accepted by this Court, is that any national court whose domestic law permits it to provide advisory opinions will be able to seek guidance from the CJEU on any EU law topic of actual or potential interest to politicians, whether state/regional politicians (as in, say, the German Lander), politicians of devolved governments or administrations (like Scotland, Northern Ireland or Wales in the UK, or, say, the autonomous communities of Spain), national/federal politicians or MEPs. Nor is there any reason why such enquiries be limited to concerned politicians and could not extend to like questions posed by citizen activists of any form. As for subject-matter, there appear to be no limits. Such a device could be

used to establish the legality or legal effect of: a draft EU Directive or Regulation; a draft Treaty; a mooted (but not yet adopted) Member State opt out; or, more topically, a draft Withdrawal Agreement.

5. The United Kingdom's response is that whether or not its domestic law permits the provision of such advisory opinions (and it considers Scots law permits no such generally formulated relief, and is, as a result, concurrently seeking to appeal to the UK Supreme Court to establish the same), this Court should not countenance answering any questions in such form, however important they may appear. To do so, particularly: (a) without there being any draft act even in contemplation, still less at the point of adoption; (b) with there being no domestic dispute; (c) at two stark levels of hypotheticality (see paragraph 3 above); and (d) in a context of pure politics far removed from any direct or immediate impact upon protected rights or duties, would undermine the carefully calibrated system of checks and balances in the TEU and TFEU, and in particular the scheme of remedies and standing it provides.

6. The fact that answers to the Questions are perceived as central to the viability of some UK political options in response to Brexit that domestic politicians and activists advocate as the Brexit negotiations reach their crescendo is no basis to jettison the answer demanded by a faithful application of principles previously identified and applied by this Court. That answers to the questions are germane to an unfolding political debate of the highest profile is not an exceptional reason to answer them. Rather, it is a powerful factor confirming the wisdom of the conventional approach, as answering the questions would require the CJEU to engage in a fundamental redraft of its judicial role, and would draw it directly into the domestic political fray at a most unfortunate time, in a most unfortunate manner, running against all ordinary maxims and wisdom of judicial self-restraint in constitutional cases.

7. With this substantial introduction, these Observations have the following scheme:

   a. **Section B** explains why the Referring Court's questions are (a) hypothetical; and (b) inadmissible under this Court's accumulated and consistent case-law as a hypothetical question without an underlying dispute.

   b. **Section C** explains why, as a matter of wider Treaty construction and precedent, it is impermissible to entertain a request for what is in truth a request for EU constitutional advisory opinion.

   c. **Section D** applies these considerations to the particular circumstance of Article 50 and Brexit to explain why the Referring Court's questions should be rejected as inadmissible.

   Due to the hypothetical nature of the Questions the UK does not intend to address them in these written observations. To do otherwise in the present case would produce the very consequences the rules on refusing hypothetical questions are designed to avoid.

B. The Questions are inadmissible because they are hypothetical

(i) *The function of EU rules of admissibility*

8. The starting point for any admissibility analysis is of course the cooperative nature of the preliminary reference procedure created by Article 267 TFEU. The preliminary reference procedure enables the CJEU to use its special position and expertise to assist in the resolution of disputes arising before national courts. The CJEU ruling *must* contribute to the resolution of a domestic dispute. And yet the position (as here) in which one party contends that if X happens the legal analysis will be Y; and the other party refuses to engage unless and until X happens (which it has not) is not in any sense a "dispute".

9. The consistent case-law of this Court (see for instance the Grand Chamber decision in Case C-62/14 *Gauweiler* EU:C:2015:400 at [25]-26]) shows that in the context of a reference for a preliminary ruling under Article 267 TFEU**:**

   a. Questions referred by national courts enjoy a presumption of relevance. In short, the CJEU presumes that the question referred is of relevance to the resolution of a dispute before the national court. It certainly does not check whether national procedure had been observed in making the reference; and

   b. The CJEU will reject a reference as inadmissible only where it is quite obvious that the question referred bears no relation to the facts, is hypothetical, or requires further facts to be set out in order to provide a useful answer.

10. Explicit (and to a degree implicit) within this reasoning is that EU law *does* supply its own autonomous rules and controls to reject questions referred under Article 267 TFEU as inadmissible that: (i) show an impermissible degree of hypotheticality, such that there is no dispute properly so-called; and (ii) operate to circumvent the scheme of the Treaty, particularly its rules on remedies and standing. The whole point of such residual EU admissibility rules is to preserve and reflect the EU legal order.

(ii) *The case-law on hypothetical questions*

11. Hypothetical questions address facts that have not occurred and may not occur, such that there is no concrete dispute. To answer hypothetical questions is: (i) generally ill-advised in principle (the facts may never come to pass; they may unfold very differently to predictions); (ii) consumptive of limited judicial resource; and (iii) difficult to control once permitted (and thus invariably regulated by strictly formulated procedures, addressing permitted topics, standing, relief etc, all laid out in advance).

12. Hypotheticality is a relative concept. Objections to hypotheticality are less acute in public law so long as: (i) a law, act or policy has been definitively adopted

(because then the political and legislative process is complete and judicial scrutiny respects legislative, parliamentary and/or executive privileges and the process of law and policy formation); and (ii) the potential of the measure for (adverse) future effects is shown to be inevitable or strong.[1] But again, if the legality of the law or its application may be likely to be fact sensitive, such would militate against addressing the point until an appropriate test case arises to produce a contested application of law to actual facts. And if the real dispute is not ultimately between the parties petitioning for advice on the law but in truth between one of them and another Member State or institution then the proper procedure for ventilating that dispute should be followed.

13. Unsurprisingly such features can be seen in this Court's case-law.

14. First, the Court's case-law has consistently operated to refuse consideration of questions arising from contrived or artificial proceedings where no true dispute exists between the parties and where the proceedings are designed in fact to secure advisory opinions, or advice in one Member State as to the legality of the rules operated in another.

    a. Thus in Case 104/79 *Foglia v Novello (No.1)* EU:C:1980:73 the CJEU refused to answer questions posed by an Italian court that were in part of a scheme designed to test the legality of French consumption taxes payable upon importation to France, in circumstances where the French tax had been paid without protest and the interests of the parties were aligned.

    b. In Case 244/80 *Foglia v Novello (No.2)* EU:C:1981:302 the national court sought to emphasise that the resubmitted questions arose in the context of a claim for declaratory relief in the Italian proceedings, but such question was still rejected by the CJEU as inadmissible being in substance a request for an advisory opinion about the compatibility of a law of another Member State.

    c. And in Case C-318/00 *Bacardi France* EU:C:2003:41 the CJEU refused to rule upon a reference from the English High Court (in what was plainly a genuine dispute) since to do so would have called upon it to pass judgment upon the compatibility of the French Loi Evin with EU law in a dispute arising in English proceedings when it was not satisfied it was strictly necessary to do so, since the national court had failed to explain how the dispute before it required resolution of such issue.

15. Second, the requirement to have clear and precise explanations of the relevance of the questions referred, and the underlying facts from which they actually arise, in order to avoid the answering of hypothetical questions is epitomised by Case

[1] Similar considerations inform what English lawyers would call *quia timet* relief in a private law context, that is relief by injunction or interdict (in Scotland) or by pure declaratory relief to prevent strictly anticipated future illegal behaviour (as opposed to the future recurrence of past breaches) of invasive of someone's rights or in breach of duty, such as an anticipated nuisance that will make a property uninhabitable. The Court's ruling in Case C-415/93 *Bosman* EU:C:1995:463as to the nationality rules (which had been adopted, and were operating to 'chill' the employment prospects of all EU national footballers) addressed a problem of this character.

C-83/91 *Meilicke* EU:C:2011:438 where the CJEU reiterated the impermissibility of hypothetical or "examination style" questions. The case had apparently been orchestrated by a company lawyer with a desire to test his particular personal theories of company law. The relationship of the questions to the facts of the case was not established, and so the questions rejected as hypothetical: see [28]-[31]. A further clear example of this principle, leading to the rejection of questions which would not answer any dispute actually arising from the facts in issue in the domestic proceedings, is provided by Case C-571/10 *Kamberaj* EU:C:2012:233: see the rejection of the 1st, 4th-7th questions on the basis that the need to resolve such questions did not arise from the facts, especially at [44]-[58].

16. Third, this Court's stance against hypotheticality is not, however, total. Thus, the line of authority beginning with Case C-491/01 *British American Tobacco* EU:C:2002:741 and culminating in *Gauweiler loc cit* and Case C-304/16 *R(American Express*) EU:C:2018:66 shows that a modest degree of hypotheticality will be tolerated. The critical facts in each of these "implementation period" cases is that: (a) there is still a dispute as to whether there will be any implementation obligation; (b) because the target of the challenge is the validity of an *EU act* (a Directive, a Regulation etc) which had been definitively adopted, creating both current EU law duties[2] and prospective EU law duties of implementation for the domestic authorities, even if the time for its implementation or application had not yet expired; (c) the alleged adverse effects of the EU measures; (d) later disputes as to the validity of the EU instrument/act after legal implementation were inevitable (because BAT and others would challenge the legality of the Tobacco Directive; Amex would challenge the application to it of four party scheme rules etc); and (e) the effect of providing an early analysis of validity had the effect of avoiding potentially substantial or irreparable harm should the challenge be well founded.

(iii) *The hypotheticality of the Questions*

17. The Questions are hypothetical because the chain of events they seek to map and analyse legally have not occurred and are not likely to. That is because the UK Government has consistently reiterated its intention to honour the referendum by giving notice under Article 50 TEU ("**the Notice**") and thereby withdrawing, whether on agreed or 'no deal' terms:

    a. Such was its stance throughout the *Miller* litigation[3], which culminated in the UK Parliament conferring the power to give Notice upon the Prime Minister by the European Union (Notice of Withdrawal) Act.

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2 As to the legal duties of Member States during the transposition period see Case C-129/96 *Inter-Environnement Wallonie* EU:C:1997:628 at [35]-[45].

3 See *R(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at [169] per Lord Reed. The Claimant, Miss Miller, asserted such irrevocability as a matter of law. The Government did not accept or dispute this legal proposition, because it considered any Notice to be politically irrevocable, whatever the legal analysis. The Court thus proceeded on the assumption that the Notice would not be revoked.

b. Notice was given on 29 March 2017 since which time the consistent position of the UK Government has been that Brexit will occur, either on agreed terms or as provided by Article 50.3 TEU.

c. Consistent with this, the Referring Court was told the United Kingdom's policy "*that the United Kingdom's Article 50(2) TEU notification will not be withdrawn*": see §2.2 of the Petitioners' Note.

18. Despite this being the course presently plotted, the Questions explore the potential legal implications of an alternative course, asking in substance whether and how the Notice can be withdrawn: see §2.8 of the Petitioners' Note of Argument (**"the Petitioners' Note"**, Appendix 1). But this is hypothetical on at least two levels.

a. First, it assumes an attempt by the United Kingdom (whether at the instigation of its Parliament or otherwise) unilaterally to withdraw or revoke the Notice ("**the Hypothetical Revocation**"). The Question thus assumes an *action* that does not exist.

b. Second, it is also the case that the hypothetical response of the Commission or the remaining 27 Member States to such Hypothetical Revocation is not known. Consent to withdrawal of the Notice may be forthcoming, even if they insist their unanimous consent is required. The Question thus further assumes a *reaction* by the remaining EU states/institutions, which reaction then produces a *dispute*.

19. As such the basic prohibition, arising from *Foglia v Novello*, *Meilicke*, *Kamberaj* and like cases upon the answering of hypothetical questions or providing advisory opinions should be applied.

20. The "implementation period" cases (but not the cases showing the impermissibility of pure "advisory opinions" or "wrong forum" disputes) were relied upon very heavily by the Referring Court to predict that this Court would not reject the proposed reference as inadmissible. But, properly analysed, such "implementation period" cases are simply not on point, because, taking the factors identified above in turn:

a. There is no dispute. The United Kingdom has not set out its legal views on the legal effects of any Hypothetical Revocation in the domestic proceedings (see paragraph 2 of the Order for Reference) and does not do so now.

b. The target of the challenge is not even a hypothetical complaint about the *validity* of an *EU measure*. The target of the challenge is the compatibility with EU law of a purely *national* Hypothetical Revocation.

c. No act (whether EU or domestic) has been adopted but yet to take effect.

Putting (a) to (c) together, the United Kingdom can identify no case in which the CJEU has permitted itself to examine the legality or effect of an entirely putative

or hypothetical national measure (not even existing in draft) which does not amount to a means of implementation of an EU obligation. Moreover, and further:

d. There is no inevitability of dispute of the kind contemplated. The Hypothetical Revocation may never occur (as the United Kingdom Government affirms); and even were it to occur it (or an agreed variant) may prove acceptable to all the 27 Member States in any event; and

e. Far from potentially avoiding irreparable harm by the early resolution of an inevitable dispute as to validity, the effect of early and hypothetical resolution will be an unjustified and potentially very damaging intervention by this Court into the delicate internal politics of a Member State: see further Section D below.

C. Circumvention of the Treaty limits upon providing advisory opinions

21. Were it not enough that the Questions were plainly hypothetical, it is also obvious that the preliminary ruling procedure provided by Article 267 TFEU cannot be used to ask such questions.

22. That is because questions will also be declared inadmissible when the preliminary ruling procedure (or such procedure used by a particular national court) is not the proper means by which to raise the questions at hand. On this analysis the CJEU should only answer questions coming before it under the correct procedure; and should be astute to prevent improper circumvention of Treaty limitations on reviewability/justiciability, standing or time limits.

23. Thus, in Case C-188/92 *TWD Textilwerke Deggendorf GmbH* (*"TWD"*) EU:C:1994:90 the CJEU held that the beneficiary of state aid, which clearly had standing to bring a direct action against the decision finding that state aid to be unlawful pursuant to Article 263 TFEU (as it now is), could not collaterally challenge the validity of such decision in a *Fotofrost* reference from domestic proceedings. The plain logic is of this ruling was that it as abusive or improper for TWD to attempt to circumvent the proper procedure provided for challenge, not least because such procedure brings with it a strict time limit for judicial review which TWD had not respected.

24. Equally, by dint of the same logic prohibiting collateral attack, it is in principle impermissible to use proceedings in State A to test the legality of acts in State B. The very recent Case C-557/16 *Astellas* EU:C:2018:181 makes such reasoning explicit at [40].[4]

[4] As AG Lenz identified in *Bosman* at [AGO103] and following, such reasoning about the misuse of the preliminary reference procedure seems, in substantial part, to be the supressed premise of the *Foglia*, *Foglia (No.2*) and, by extension, the *Bacardi* litigation (which post-dated *Bosman*). In such cases, this Court was concerned that the legality of the French laws should only be tested in the proper (French) proceedings where the true dispute would arise *directly* as against the French state (where it could defend its laws, including by deploying evidence and argument), as opposed to *collaterally*. Indeed, outside disputes governed by EU law such is the result required by tenets of judicial self-restraint such as the act of state doctrine (or equivalent doctrines based on comity) which prevent State A inquiring as to the validity of the laws of State B.

25. Given such requirement to respect (i) the limits of the remedies provided by the Treaties; and (ii) the allocation of roles between Member States courts, the United Kingdom also suggests that it is helpful to see the Petitioner's action for what it is, namely a collateral request (i.e. routed via national proceedings) for an advisory opinion on a question of EU constitutional law that is either designed or will operate to circumvent the clear Treaty limits upon such exceptional remedy. The impermissibility in principle of such remedy is only accentuated by the use to which it is to be put: such advice is sought so that the Petitioners can use it to influence the domestic politics of a Member State *before* such question arises in fact.

26. In the United Kingdom's view advisory opinions and hypothetical questions are closely linked but distinct concepts. Where permitted by the relevant constitutional order the essence of an advisory opinion, truly so called, is to provide advance legal clearance or objection for a proposed course of action which is at a sufficient state of preparedness or detail, and sufficiently close to adoption, for the Court to opine on its legality. Advisory opinions are inherently forward looking and provided before any final act is adopted. But invariably, where they are permitted, a review of comparative constitutional provisions shows that advisory opinions:

    a. are grounded upon a final or near final proposed course of action: the act must be all but complete or at the very least in direct contemplation of the decision maker;

    b. entail or require a real dispute, with the Court adjudicating on the rival argument even if the adversarial element is supplied by an *amicus curiae* or some such device (as with care or continuation of treatment cases, trust disputes about proposed rearrangements or disposal of assets etc); and

    c. are typically exceptional, being accompanied by strict rules of subject-matter and standing, which identify the limited categories of case where challenge is permissible, and the limited institutions or parties with standing to bring such a challenge. Advisory opinions in relation to public law or constitutional questions are by corollary political and potentially highly controversial; and mature legal orders restrict the circumstances in which such matters can be raised. Such limiting rules and such dedicated procedures should not be capable of circumvention by the simple expedient of using an alternative general procedure.

27. The first two features (on which the Petitioners' case fails) provide the overlap with the general rules on the inadmissibility of hypothetical disputes. The third feature merits further analysis because it is quite clear that the TFEU does provide for advisory opinions but only in truly exceptional circumstances. The TFEU is quite clear: advisory opinions from the CJEU on questions of EU law are only permissible in the very narrow circumstances permitted by Article 218(11), namely where a question arises as to the legality of a proposed international agreement. Even here several features are of note:

a. Such procedure contains a standing rule: requests for such Opinions are permitted only by Member States or EU institutions. So individual or groups of MEPs cannot request an Opinion, still less parliamentarians in national bodies.

b. The Opinion is directed at a tolerably concrete target, namely a draft agreement which in fact it is proposed to conclude or an agreement of a contemplated form or goal. No Opinion could be sought in relation to an agreement which it is not proposed to seek and in relation to which there is no decision authorising the opening of negotiations under Article 218(2). (Yet that of course is precisely analogue to the present case).

c. The reason of principle for such provisional or *ex ante* judicial review is clear: after the event review (i.e. review after the international agreement has been concluded), whatever the effects of a successful challenge in the EU legal order, will not prevent the EU and its constituent Member States from having concluded binding obligations on the international plane with the applicable counterparty Contracting States. So *ex ante* judicial review is provided in this exceptional circumstance to prevent to the fullest extent possible a clash between the internal EU legal order and the EU's international obligations. Yet no such clash will arise in the present case, whose facts are confined to the EU legal order alone.

28. The plain inference is that outside these very narrow parameters it is impermissible for the Court of Justice to provide an advisory opinion on the legality of a proposed *EU* Act, still less upon the effect of *national* act, whatever its constitutional import. To permit such advisory opinions to be sought of this Court via the Article 267 TFEU preliminary reference mechanism impermissibly circumvents the carefully drafted limits upon advisory opinions in the Treaty, and subverts the plain and deliberate omission of any like advisory opinion mechanism from the text of Article 50 TEU (where it could have been deployed by analogy).

29. As such, the only means by which a legal dispute in relation to the matters canvassed by the Questions may properly arise, *were* the UK to make a Revocation and *were* it to trigger a dispute with the remaining Member States and EU institutions, is by means of a properly composed direct action brought before this Court once the lines of dispute were clear (advanced, no doubt with any exceptional urgency such hypothetical scenario warrants). Such direct action could be brought, if at all:

a. under Article 258 TFEU, should the Commission wish to challenge the effect of any Hypothetical Revocation for an alleged failure to obtain consent;

b. under Article 259 TFEU, brought by the United Kingdom, should a dispute with one or more Member States arise as to the effect of any Hypothetical Revocation; or

c. brought by a Member State, the European Parliament, the Council or the Commission, under Article 263 TFEU (to the legality of any consequential act of the Council or Commission). It is inconceivable any natural person will be able to show direct and individual concern.

30. The analysis of these provisions is also revealing. It demonstrates that the only means of challenge are:

a. For domestic law challenges to decisions seeking to revoke a Notice, under the national constitutional law of the Member State concerned; or

b. For EU law challenges to the effect of such unilateral Notice or to the EU Member States' or EU institutions' actions in refusing to accept the same, before the CJEU in a direct action.

But, since they will not have direct or individual concern, there is no option for individual citizens (however interested they may be) to challenge before the CJEU the validity of what is in effect the Treaty-making or confirming powers of the Member States *inter se* in relation to the making or amendment of the EU constitutional agreements themselves.

D. No exception for Brexit

31. Given the clarity, consistency and strength of the above barriers to admissibility, the only question arising is whether somehow the principled answer should be changed simply because the Questions concern Brexit. Is this a difficult case requiring aberration from the usual rules of Union law? The United Kingdom Government suggests that far from causes for a reappraisal of or exception from the conventional approach, the present case calls for its unwavering application for three reasons.

32. First, adjudicating upon such issue by means of an advisory opinion when the domestic UK political process is both still running its course and at a position of real sensitivity would be, whatever its intent, an intervention of the kind that any constitutional court should eschew unless unavoidably driven to it. To do so when no concrete legal issue *requires* resolution would be a fundamental failure in the separation of powers, which requires courts to avoid trespass into the political area (where action is debated and contemplated) belonging exclusively to the legislature and executive. It would entail adjudication upon a matter of law or policy before it has been finally or firmly concluded by the relevant political actors (whether the UK Government or Parliament).

33. Second, the wisdom of such self-limiting role with respect to controversial yet hypothetical 'political' debates, and the policing of the constitutional limits upon advisory opinions, is borne out by all comparative constitutional comparisons, even including comparisons with the more 'activist' courts. Thus, taking but four examples (two drawn from Member States):

a. US: Since the time of Jay CJ (in the exchange of letters with then Secretary of State Thomas Jefferson) the US Supreme Court has resisted the provision of advisory opinions on constitutional matters, even at the suit of the Executive.[5] Allied to this are strict rules on 'ripeness' precluding rulings on hypothetical issues, epitomised by *United Public Workers v Mitchell* where the Court observed "*A hypothetical threat is not enough. … Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories*;[6] *Poe v Ullmann;*[7] and *Abbott Laboratories v Gardner*[8] where it was stated, appositely for present purposes that the rationale of such a rule is to *"… prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties*."

b. Canada: Advisory opinions are permitted by section 53 of the Canadian Supreme Court Act, but only in tightly trammelled circumstances at the suit of the Governor in Council alone. Even here abstract or hypothetical questions are impermissible.[9] General rules on admissibility, closely resembling (and drawing from) the US SC jurisprudence prevent resolution of hypothetical disputes, as contrary to the common law method of adjudication, which depends on a true, live dispute between adversarial parties.[10] Thus in *Borowski v Canada (AG)* a pro-life challenge which had become academic (because the provision at issue had been struck down on other grounds) was dismissed both because of its mootness and because it would circumvent the standing limits on advisory opinions, turning the appeal into "*a private reference [for an advisory opinion*]".[11]

c. Ireland: Following the approach of the US and Canadian Supreme Courts to the question of admissibility/justiciability, the Irish courts have developed a doctrine of ripeness and mootness: see e.g. *Blythe v AG (No 2)* [1936] 1 IR 549; *Goold v Collins* [2004] IESC 38; and *Lofinmakin v Minister for*

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5 See J Nowak and R Rotunda, *Constitutional Law* (8th edn, Hornbook Series 2010) at §2.12(b)(i); see also *Flast v Cohen* 392 US 83 (19680 at pp.96-7 per Warren CJ.

6 330 US 75 (1947), at p.90.

7 367 US 497 (1961) especially Justice Frankfurter's dictum that "*For just as the declaratory judgment device does not purport to alter the character of the controversies which are the subject of the judicial power under the Constitution … it does not permit litigants to invoke the power of this court to obtain constitutional rulings in advance of necessity … The court has been on the alert against use of the declaratory judgment device for avoiding the rigorous insistence on exigent adversity as a condition for evoking court adjudication.*"

8 387 US 136 (1967) at p.148

9 See *AG of Ontario v AG of Canada* [1896] AC 348 at pp.370-1; and, more recently, *Reference re Goods and Services Tax Implementing Legislation* [1992] 2 SCR 445 at p.485 per Lamer CJ.

10 See, generally, *Reference re Same Sex Marriage* [2004] 3 SCR 698 at [63]; and R Crane QC and H Brown QC, *Supreme Court of Canada Practice* (Thomson Carswell 2005) at p.106.

11 1989] 1 SCR 342, at [52] per Sopinka J for the Court. See also *Geophysical Service Inc v National Energy Board* [2011] FCA 360 at [9] per Evans JA citing judicial restraint and conservation of resources as the rationale for the ripeness rule.

Justice, Equality and Law Reform [2013] IESC 49, especially at [51](iv) per McKechnie J where it was noted that "*It follows as a direct consequence of this rationale, that the court will not - save pursuant to some special jurisdiction - offer purely advisory opinions or opinions based on hypothetical or abstract questions.*" Article 26.1 of the Irish Constitution empowers the President alone to refer a Bill that has passed both Houses of the Oireachtas to the Supreme Court in order to determine if any of its provisions would be inconsistent with the Constitution. The Irish Courts will not provide advisory opinions outside the narrow scope of this special procedure.[12]

d. Germany: the German constitution provides for abstract judicial review, or a form of advisory opinion under Article 93(1)2 of the Basic Law, but only at the suit of a privileged actor, *viz* a federal or state government or one-fourth of the members of Bundestag. But whether seized of an abstract judicial review, a constitutional complaint (as to which there are separate limiting principles of concreteness and standing) or a concrete judicial review, the BVerfG follows maxims of self-restraint in relation to hypothetical disputes akin to those adopted by the US Supreme Court.[13]

34. Third, for the CJEU to intervene in this way, with the Brexit negotiations still underway and the domestic politics in relation to such negotiations still very much alive, creating an international and domestic context that is politically "supercharged", carries real dangers, whether in terms of inevitable, intended or unintended effects. One consequence appears inescapable, namely that the Court's intervention to support either substantive answer available will be painted as partial by some parties in the political debate yet to conclude. For instance, were the Court to act to uphold the Petitioners' case, it will be said to be motivated by a desire to succour those favouring continued membership of the EU; were it to act to reject it, simply as favouring the negotiating position of the EU27 against the UK. Such views themselves may shift ongoing political debate. The more appropriate constitutional view is surely that any and all (unpredictable) forms of consequential political effect are an excessive price to pay for answering unnecessary or "unripe" political questions.

35. Nor, when asking whether a "Brexit-exception" should be made from the application of this Court's conventional principles of judicial self-restraint in relation to hypothetical question or advisory opinions, should it be forgotten that the potential role of the Court under any withdrawal or other international agreement including the UK, and its capacity for respectful and neutral adjudication in such context, is itself a matter of current domestic dispute and international negotiation. Historically, the Court undoubtedly has been the engine for legal integration within the EU. However, the Court's possible role under any putative withdrawal agreement or future international agreement

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12 M Forde SC and D Leonard BL, *Constitutional Law of Ireland* (3rd edn, Bloomsbury Professional 2013) at §2.15.

13 See D Kommers and R Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) at p.34.

governing the long-term relations between the UK and the EU, and its successful discharge of any such role, may depend upon it being able and *being seen to be able* to respect also the viewpoint of those favouring direct national sovereignty and democracy over the demands of EU integration.

Submitted by:

Clare Brodie
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30 October 2018

The Rt Hon Lord Keen of Elie QC
Her Majesty's Advocate General for Scotland

Thomas de la Mare QC
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