

**IN THE COURT OF JUSTICE OF THE EUROPEAN UNION****CASE C-621/18****WIGHTMAN e. a.**

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**WRITTEN OBSERVATIONS of TOM BRAKE MP & CHRIS LESLIE MP**

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Submitted pursuant to Article 23 of the Statute of the Court of Justice by **Tom Brake MP and Chris Leslie MP**, who are represented by:

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**Date: 30 October 2018****A. INTRODUCTION**

[1] Tom Brake MP and Chris Leslie MP (**‘the MPs’**) are Members of Parliament in the House of Commons of the United Kingdom and are parties to the main proceedings before the Court of Session (**‘the Referring Court’**). Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice, they submit the following written observations on the question referred for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (**‘TFEU’**).

[2] The background is set out in the Referring Court’s request and more fully described in its judgment of 21 September 2018,<sup>1</sup> which accompanied the request for a preliminary ruling. The Referring Court asks whether a Member State that has notified its intention to withdraw from the Union under Article 50 of the Treaty on European Union (**‘Article 50’**; **‘TEU’**) may unilaterally revoke that notification and, if so, subject to what conditions, and with what effect.

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<sup>1</sup> [2018] C-621/18, available at <http://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csih62.pdf>.

[3] For the reasons set out below, the MPs invite the Court to answer the question as follows:

A Member State that has notified the European Council of its intention to withdraw from the Union in accordance with Article 50(2) TEU may unilaterally revoke that notification, so that the Treaties will continue to apply to that Member State with full force and effect, provided that: (1) the decision to revoke the notification is made in accordance with the Member State's own constitutional requirements, in good faith, and consistently with the principle of sincere cooperation; and (2) the revocation is notified to the European Council prior to the date on which the Treaties would otherwise cease to apply under Article 50(3) TEU.

## B. ADMISSIBILITY

[4] In the main proceedings, the United Kingdom Government argued that the issue that is raised in this case is academic and hypothetical and, therefore, inadmissible both under national law and under Article 267 TFEU. The Referring Court rejected that argument. Its judgment makes it clear that the courts in Scotland do not entertain questions that are merely academic or hypothetical.<sup>2</sup> The Referring Court found, as a matter of national law, that: (1) it is neither academic nor premature to ask whether it is legally competent for the United Kingdom to revoke the Article 50 notification and thus to remain in the EU; (2) that issue is a matter of practical importance, is legally uncertain and is the subject of a dispute; and (3) Members of the United Kingdom Parliament have a clear interest in determination of that issue.<sup>3</sup>

[5] The Referring Court specifically rejected the Government's argument that the issue is hypothetical because of the Government's stated *policy* that the Article 50 notification will not be revoked. The Referring Court's judgment emphasises that, as a matter of settled constitutional law in the United Kingdom, it is Parliament—not the Government—that has the constitutional power to take the final decision about withdrawal from the European Union, and

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<sup>2</sup> Ibid., §§22, 55.

<sup>3</sup> Ibid., §§27, 31 (Lord Carloway); §§37-40 (Lord Menzies); §§58-59, 60-62, 69 (Lord Drummond Young). For completeness, it should be noted that, in arguing that the matter was of practical importance and legally uncertain, the MPs relied in the national proceedings on a published legal opinion, '*In the Matter of Article 50 of the Treaty on European Union*', 10 February 2017, available at [https://www.bindmans.com/uploads/files/documents/Final\\_Article\\_50\\_Opinion\\_10.2.17.pdf](https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf).

that decision has not yet been made.<sup>4</sup> The United Kingdom Government's *policy* does not define the limits of the *decisions* that the United Kingdom Parliament may take.

[6] The Referring Court acknowledged that admissibility under Article 267 TFEU is a question for this Court. It considered the case-law and the principle that the preliminary ruling procedure cannot be used for purely advisory opinions, or where there is no genuine dispute.<sup>5</sup> It concluded that it was appropriate to request a ruling in this case. The Lord President observed that it would be 'disappointing' if a rare request for assistance from the Scottish courts were to be met with a negative response.<sup>6</sup>

[7] The case-law makes it clear that, in the context of the cooperation between this Court and national courts under Article 267 TFEU, it is solely for the national court to determine both the need for a preliminary ruling and the relevance of the questions that it submits, and that such questions enjoy a presumption of relevance.<sup>7</sup> In the light of the Referring Court's clear conclusion that this case involves a dispute that is not hypothetical, and that there is a need for a preliminary ruling on EU law in order to enable it to deliver judgment, the request for a preliminary ruling is admissible.

### C. INTERPRETATION OF ARTICLE 50

[8] In order to ascertain the meaning of Article 50, '*it is necessary to consider the spirit, the general scheme and the wording of those provisions*': Case C-26/62 *van Gend en Loos* (EU:C:1963:1).

[9] In seeking to determine the spirit and general scheme, it is also legitimate to refer to the *travaux préparatoires*.<sup>8</sup>

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<sup>4</sup> Ibid., §§27-28, 38, 50-57, referring to the judgment of the United Kingdom Supreme Court in *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>5</sup> Ibid., §§30, 42, 60-62, referring to Case C-643/16 *R (American Express)* (EU:C:2018:67); Case C-62/14 *Gauweiler* (EU:C:2015:400); Case C-327/18 *PPU RO* (EU:C:2018:733).

<sup>6</sup> Ibid., §30.

<sup>7</sup> Case C-179/16 *Hoffman-La Roche* (EU:C:2018:25), §§44-45 and the case-law cited.

<sup>8</sup> See Case C-583/11P *Inuit Tapiriit Kanatami* (EU:C:2013:625), §59 and the Opinion of Advocate General Kokott (EU:C:2013:21), §§38, 40-41, 90. This is also consistent with the approach under customary international law, reflected in Articles 31 and 32 of the Vienna Convention, which is binding on the Institutions and part of the EU legal order: see Case C-15/17 *Bosphorus Queen Shipping* (EU:C:2018:557), §67.

## (1) The Spirit

[10] The ‘spirit’ of the TEU can be identified from its Preamble, and from the ‘*Common Provisions*’ in Title I:

- (i) The Preamble refers to the Treaty marking ‘*a new stage in the process of European integration*’. It emphasises the signatories’ desire and resolve to ‘*deepen the solidarity between their peoples*’, ‘*to achieve the strengthening and the convergence of their economies*’, ‘*to establish a citizenship common to nationals of their countries*’ and ‘*to continue the process of creating an ever closer union among the peoples of Europe*’. Article 1 TEU records that the Treaty ‘*marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*’. Article 3(3) TEU identifies the Union’s aims as including the promotion of ‘*economic, social and territorial cohesion, and solidarity among Member States*’;
- (ii) The Preamble, and Article 2 TEU, also make it clear that the Union is founded on universal values including ‘*democracy, equality and the rule of law*’, which are common to the Member States. The Court has affirmed that this implies ‘*the existence of mutual trust between the Member States that those values will be recognised, and therefore, that EU law implementing them will be respected*’;<sup>9</sup>
- (iii) Article 4(3) TEU imposes obligations of sincere cooperation and mutual respect on the Union and on the Member States. Under Article 4(2) TEU the Union is required to respect the Member States’ national identities, including their political and constitutional traditions and structures. That principle of respect for national constitutional requirements is a founding principle of EU law,<sup>10</sup> and deference to national constitutional requirements is mentioned throughout the Treaties.<sup>11</sup>

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<sup>9</sup> Case C-327/18PPU *RO* (EU:C:2018:586), §34.

<sup>10</sup> Opinion of Advocate General Bot, Case C-42/17 *MAS, MB* (EU:C:2017:564), §§172-175; Opinion of Advocate General Ruiz-Jarabo Colomer, Case C-205/08 *Umweltanwalt von Kärnten* (EU:C:2009:397), §47 and footnote 32; Opinion of Advocate General Poiares Maduro, Case C-213/07 *Michaniki AE* (EU:C:2008:544), §31.

<sup>11</sup> See, e.g., TEU Articles 6, 42, 48, 49, 50, 54 and 55; TFEU Articles 25, 218, 223, 262, 311 and 357; as well as Protocol No. 1 on National Parliaments, Protocols Nos. 16 and 22 relating to Denmark, and Protocol No. 35 relating to Ireland.

[11] Reflecting those principles, the mechanism governing withdrawal from the Union under Article 50 is premised on a Member State taking a decision ‘*in accordance with its own national constitutional requirements*’. Article 50 recognises that each Member State has the right to decide, voluntarily, to withdraw from the Union, and that the decision is governed exclusively by national constitutional requirements, which the Union must respect.

[12] In answering the Referring Court’s question, the Court should adopt an interpretation of Article 50 that is consistent with the Treaty’s respect for democracy and national constitutional requirements, and the TEU’s aims of greater integration and solidarity between the Member States.

[13] It is consistent with those principles, and therefore with the spirit of the TEU, that a Member State may change its intention and decide to remain within the Union during the negotiating period provided for under Article 50(3) (**‘the Negotiating Period’**).

[14] Such an interpretation of Article 50 ensures that the final decision about membership of the Union remains in the hands of the Member State and its citizens, via their own national constitutional structures. It is an interpretation that respects democratic principles, including the role of national parliaments and the need for a valid, democratic decision to withdraw from the Union to be made on a conscious and fully-informed basis. Respecting the right of a Member State democratically to change its intention during the Negotiating Period protects both the Member State and the Union from the negative consequences of a decision to withdraw that was made on the basis of incorrect or unrealistic assumptions, or where circumstances have subsequently changed during the Negotiating Period.

[15] This interpretation of Article 50 respects and upholds the fundamental right of each Member State to decide, voluntarily and in accordance with its own constitutional requirements, whether to remain within the Union. It allows a Member State to change course via its national democratic structures, and to re-commit itself to membership of the Union and the aims of the Treaties. It is, in this regard, the only interpretation of Article 50 that is truly consistent with the spirit of the Treaties and the TEU’s ultimate goals of greater integration and ever closer union.

## (2) The General Scheme

### (i) Procedural nature of Article 50

[16] Article 50 is located almost at the end of the TEU, in *Title VI-Final Provisions*, following Article 48 (*procedure for amendment of the Treaties*) and Article 49 (*procedure for accession*). Viewed in that context, and in the light of the TEU as a whole, it is clear that Article 50 is about *procedure*.

[17] The text of what is now Article 50 was included as Article I-60 in the Constitutional Treaty, and was later adopted at Lisbon without fundamental change. The *travaux préparatoires* from the Convention on the Future of Europe confirm that the provision was designed to provide a procedural framework, without constraining the essentially unilateral and voluntary nature of a Member State's decision to withdraw from the Union. The Convention Praesidium's draft proposal<sup>12</sup> was accompanied by the following comments:

*'Article 46: Voluntary withdrawal from the Union*

*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 ...'*

[18] A number of amendments were put forward, attempting to make a withdrawal decision subject to substantive conditions or to the successful conclusion of a withdrawal agreement, but they were rejected.<sup>13</sup>

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<sup>12</sup> CONV 648/03 *Title X: Union Membership*, 2 April 2003, Annex II, p. 9, available at <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00648.en03.pdf> [Annex 1].

<sup>13</sup> See the Convention Secretariat's Summary Sheet of Proposals for Amendments concerning Union Membership: Draft Articles Relating to Title X of Part One (Articles 43 to 46), CONV 672/03 (14 April 2003), pp.10–11, available at <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00672.en03.pdf>. [Annex 2]. The full list of proposed amendments is at <http://european-convention.europa.eu/docs/Treaty/pdf/46/global46.pdf> [Annex 3].

[19] The place of Article 50 in the scheme of the TEU is therefore clear. It was designed: (1) to acknowledge and clarify the right of every Member State voluntarily to withdraw from the Union; and (2) to set out the procedure to be followed if a Member State intends to withdraw. The negotiating history and the general scheme show that it is a procedural provision that does not limit the underlying right of each Member State to decide whether to remain in the Union.

[20] Given its procedural focus, the fact that Article 50 does not address the possibility of a Member State *revoking* a notification given under Article 50(2) does not mean that such an act is not possible. The commencement of the Article 50 *procedure* does not change the fundamental *legal position* of the withdrawing Member State *vis-à-vis* the Union. As the Court confirmed in Case C-327/18PPU *RO* (EU:C:2018:586), ‘mere notification’ under Article 50 does not alter or suspend the application of EU law, which remains in full force and effect in relation to the withdrawing Member State until it has actually withdrawn from the Union.<sup>14</sup>

[21] It follows that, during the Negotiating Period, the withdrawing Member State continues to enjoy all the rights applicable under the Treaties. That includes the right to decide whether to withdraw from the Union. Interpreting Article 50 to impose restrictions on a Member State’s ability to revoke a previous notification would convert a *procedural requirement* to notify an ‘intention’ into a *substantive provision* qualifying the essential right of the Member State to decide whether to remain in the Union, in accordance with its own constitutional requirements. Such an interpretation would defeat the intention of the authors of Article 50 and would not be consistent with its place as a purely procedural provision within the overall scheme of the TEU.

*(ii) Citizens’ rights and respect for national constitutional requirements*

[22] Article 50 must also be interpreted in a manner consistent with the rights of EU citizens. Until a Member State has actually withdrawn from the Union, its citizens remain EU citizens with all the rights and privileges that EU citizenship entails, including free movement rights under Part Two of the TFEU, the right to equality (Article 9 TEU), the right to participate in the democratic life of the Union (Article 10 TEU), the right not to be discriminated against on grounds of nationality (Article 18 TFEU), and the fundamental rights guaranteed by the Charter.

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<sup>14</sup> Case C-327/18PPU *RO* (EU:C:2018:586), §§45-46.

[23] EU law does not permit the imposition of any restrictions on those rights except as expressly provided for.<sup>15</sup> Restricting the ability of a Member State to revoke a notification that it has previously given under Article 50(2) would limit the right of the EU citizens of that Member State to determine their own political destiny, in accordance with their own national constitutional structures. Article 50 does not provide a basis for imposing any such restriction on EU citizens' rights, nor does it justify the difference in treatment on grounds of nationality that such a restriction would entail.

[24] Preventing a Member State from revoking a notification given under Article 50(2) would also, in effect, create the possibility of a Member State being forced to leave the Union contrary to its own (later) decision. Where a Member State's intention has changed, reflecting the wishes of its citizens (e.g. following a decision by a national Parliament, or an election and change of government, or a referendum), there will no longer be a valid, continuing decision to withdraw from the Union in accordance with national constitutional requirements. The express precondition of the Article 50 process, set out in Article 50(1), would no longer be satisfied. An 'enforced' withdrawal from the Union in such circumstances would be contrary to the EU's own constitutional principles. It would involve overriding the political will, and constitutional decision, of a Member State and its citizens. Such an outcome would violate the rights and status of the EU citizens who are nationals of the withdrawing Member State, and unnecessarily harm the rights and interests of nationals of *other* Member States who are resident, or exercising free movement rights, in the withdrawing State.

[25] The Article 50 procedure was intended to apply where there is an ongoing, valid national constitutional decision by a Member State to withdraw from the Union. It was not designed as a mechanism to *force* a Member State to withdraw. The Treaties contain no provision for the forced expulsion of a Member State, indeed the very concept of expelling a Member State against its own wishes is contrary to the goals of solidarity, cohesion and ever closer union that the Treaties pursue. An attempt during the Constitutional Convention to introduce a right to *expel* a Member State, alongside the right of voluntarily withdrawal, was rejected.<sup>16</sup>

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<sup>15</sup> Case C-184/99 *Grzelczyk* (EU:C:2001:458), §31.

<sup>16</sup> See the proposed amendments referred to in footnote 13 above, in particular the proposed amendment of Article I-59 on behalf of the EPP Convention Group, <http://european-convention.europa.eu/docs/Treaty/pdf/46/global46.pdf>, p. 5.



*(iii) Interests of the Union*

[26] A decision by a Member State to change its intention during the Negotiation Period, and remain within the Union, will have consequences for the Union and other Member States, and that is a matter of political significance. However, political considerations cannot override the law of the Treaties. Neither the Union nor the other Member States have any legitimate constitutional or legal interest in forcing a Member State to leave the Union, if that Member State no longer wishes to do so. On the contrary, the Union is obliged to respect national constitutional traditions and the democratic principles that they represent. Reversibility of decisions is an aspect of democratic governance, and the right to change one's mind is an inherent feature of a liberal democracy. Changes of heart, expressed in democratic ways, are a prominent feature of the history of European integration, for example in the referendums in Denmark on the Maastricht Treaty, and in Ireland on the Nice Treaty and the Lisbon Treaty.

[27] The Union's wider interests ultimately lie in avoiding a Member State leaving the Union. Withdrawal of a Member State is, by its nature, contrary to the objectives of the Treaties and the interests of the Union as a whole. The withdrawal of a Member State will inevitably give rise to negative consequences for nationals of other Member States, including EU citizens and legal persons who are resident or exercising free movement rights in the withdrawing State, or who have trading links to that State which rely on the internal market. Many rights vested under EU law will be affected by a Member State's withdrawal, as is illustrated by the present situation involving the United Kingdom. In some cases, for example withdrawal of a Eurozone State, the economic and other consequences for the Union could be even more severe.

[28] The full consequences of a proposed withdrawal may become apparent, both to the withdrawing Member State and the rest of the Union, only during the Negotiating Period. If it becomes clear during the negotiations that no satisfactory withdrawal agreement can be reached, or that the disadvantages outweigh any possible advantages, it is in the interests of both the withdrawing Member State and the Union that the Member State should be free to reconsider its intention, in accordance with its constitutional requirements. The interests of the Union and its citizens require that a withdrawing Member State should be able to change its mind before it is too late (indeed, the aims of the Treaties dictate that the Member State should be *encouraged* to do so).

[29] Fears that a withdrawing Member State could abuse the Article 50 process, or could hold the Union hostage, were considered and addressed during the drafting process.<sup>17</sup> As well as being purely hypothetical in nature, such concerns are answered by applying general principles of EU law, including the requirement for Member States to act in good faith and in accordance with the principles of mutual respect and sincere cooperation. It would, accordingly, not be open to a Member State to commence the Article 50 process in the absence of a genuine intention to leave the Union, or with the ulterior aim of renegotiating the Treaties. Nor would it be open to a Member State to give or revoke a notification under Article 50 purely to achieve a tactical advantage in negotiations. Such actions would amount to an abuse of rights, contrary to the obligations of mutual respect and sincere cooperation, and could validly be rejected by the European Council, subject to the supervision of the Court of Justice.<sup>18</sup>

### **(3) The Wording**

[30] Having considered the spirit and general scheme of Article 50 and the TEU, and in the light of those considerations, it is necessary to consider the wording of Article 50. The wording confirms that, during the Negotiating Period, a Member State may unilaterally revoke the notification of its intention previously given under Article 50(2).

[31] The text of Article 50 distinguishes between a Member State's '*decision*' to withdraw, which must be taken in accordance with the Member State's own constitutional requirements (Article 50(1)), and the requirement for the Member State to notify the European Council of its '*intention*' (Article 50(2)). Article 50 does not state, nor does it imply, that the *decision* to withdraw, or the corresponding notification of *intention*, is irrevocable. As there is no language *precluding* unilateral revocation of a notification, such an act must be presumed to fall within the power of the Member States.

[32] There is, moreover, very strong support for that presumption in the use of the word '*intention*' in Article 50(2). The term '*intention*' does not imply a fixed, irreversible commitment or obligation. A *decision* may or may not be revocable, depending on the context.

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<sup>17</sup> See the analysis of the *travaux préparatoires* in Eeckhout, P & Frantziou, E, '*Brexit and Article 50 TEU: A Constitutionalist Reading*' (2017) 54 Common Market Law Review, pp. 695-734, at §3, available at <https://westminsterresearch.westminster.ac.uk/item/q1135/brexit-and-article-50-teu-a-constitutionalist-reading> and annexed to the Written Observations of the Petitioners.

<sup>18</sup> See Benrath, D, '*Bona fide and revocation of withdrawal: how Article 50 TEU handles the potential abuse of a unilateral revocation of withdrawal*' (2018) (43) European Law Review 234-248, annexed to the Written Observations of the Petitioners.

But an *intention*, by definition, relates to an act or plan that has not yet been implemented. *Intentions* can always change. The notification given under Article 50(2) is a notification of an ‘intention’. The use of that word signifies that the Member State’s ‘intention’ (to withdraw from the Union) may change.

[33] It is also notable that Article 50 includes requirements for the unanimous consent of the European Council to extend the Negotiating Period (Article 50(3)) and for a Member State that has withdrawn from the Union to apply to re-join after the expiry of the Negotiating Period (Article 50(5)). By contrast, there are no similar rules imposed on the ability of a Member State to withdraw its notification *prior to the end of the Negotiating Period*. If a Member State decides to remain within the Union and informs the European Council that it is revoking its notification, the Article 50 process ceases and the *status quo ante* of the Member State, as a full, committed member of the Union is reaffirmed.

[34] If, *a contrario*, the right of a Member State to revoke a notification under Article 50(2) were subject to conditions, it would be remarkable that Article 50 contains no clue as to what those conditions are. Assuming that revocation is possible in at least in some circumstances, legal certainty requires that any relevant procedural conditions should be clearly set out. The ‘reading in’ of conditions by implication (such as a requirement for the consent of the Council, the European Council, or the Parliament, or conditions similar to those applicable under Article 50(5)) would lead to considerable uncertainty, including as to the time at which a decision to revoke a notification would have to be made in order to be effective. By contrast, upholding the right of a Member State, acting in good faith, to stop the Article 50 process unilaterally and remain within the Union, promotes legal certainty.

#### **(4) Vienna Convention on the Law of Treaties**

[35] The interpretation of Article 50 is a matter of EU law. However, this Court has relied on the Vienna Convention as an aid to the interpretation of the Treaties<sup>19</sup> and, in this case, the position under the Vienna Convention should be considered because the *travaux préparatoires* make it clear that the authors of Article 50 were drawing upon provisions of that Convention.<sup>20</sup>

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<sup>19</sup> E.g. Case C-53/81 *Levin v Staatssecretaris van Justitie* (EU:C:1982:105), §9; *Opinion 1/91* (EU:C:1991:490), §§14-21; Case C-312/91 *Metalsa* (EU:C:1993:279), §§10-16.

<sup>20</sup> See the extract from the *travaux préparatoires* set out at paragraph [17] above.

[36] Articles 65 and 67 of the Vienna Convention lay down procedures to be followed, *inter alia*, for withdrawal from a treaty. Under those provisions, a party may withdraw from a treaty by notifying the other parties in writing. Article 68 provides that such a notification ‘*may be revoked at any time before it takes effect*’.

[37] It is therefore clear, as a matter of public international law, that a signatory to an international agreement may unilaterally revoke a notification that it has given to withdraw from a treaty, before the notification takes effect. Having regard to the authors’ intentions recorded in the *travaux préparatoires* for the Constitutional Treaty, Article 50 should be interpreted consistently with that provision in the Vienna Convention, in the absence of any clear indication to the contrary.

#### **D. CONCLUSION**

[38] For the reasons set out above, and having regard to the spirit, general scheme and wording of Article 50 and the provisions of EU law as a whole, the MPs invite the Court to answer the Referring Court’s question as follows:

A Member State that has notified the European Council of its intention to withdraw from the Union in accordance with Article 50(2) TEU may unilaterally revoke that notification, so that the Treaties will continue to apply to that Member State with full force and effect, provided that: (1) the decision to revoke the notification is made in accordance with the Member State’s own constitutional requirements, in good faith, and consistently with the principle of sincere cooperation; and (2) the revocation is notified to the European Council prior to the date on which the Treaties would otherwise cease to apply under Article 50(3) TEU.

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**30 October 2018**