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Court procedural documents

TO THE COURT OF JUSTICE

OBSERVATIONS

submitted pursuant to Article 23 of the Statute of the Court

by the European Commission, represented by Luis Romero Requena, Karen Banks and Friedrich Erlbacher, acting as agents, with a postal address for service in Brussels at the Legal Service, *Greffe Contentieux*, BERL 1/169, 200, rue de la Loi, 1049 Brussels, and consenting to service by e-Curia

in Case C-621/18

concerning a reference to the Court under Article 267 TFEU by the Court of Session (Scotland, United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Andy Wightman MSP and others

(Petitioners and Reclaimers in the main proceedings)

and

Secretary of State for Exiting the European Union

(Respondent in the main proceedings)

on the interpretation of Article 50 TEU.

The Commission has the honour to submit the following observations:

1. ADMISSIBILITY OF THE REQUEST FOR A PRELIMINARY RULING

1. The Commission notes that in its request for a preliminary ruling and the Opinions attached thereto, the referring court explains that the petitioners are members of the Scottish, United Kingdom and European Parliaments who seek a declarator as to whether, when and how the notification pursuant to Article 50 TEU submitted by the United Kingdom to the European Council on 29 March 2017 on the withdrawal of the United Kingdom from the European Union can be unilaterally revoked by the United Kingdom in advance of the expiry of the two year period resulting from that same provision.
2. The referring court further explains that, in accordance with the European Union (Withdrawal) Act 2018, the withdrawal agreement currently under negotiation between the United Kingdom and the European Union can only be ratified by the United Kingdom if it has been approved by the House of Commons and debated by the House of Lords. In that context, members of – at least – the United Kingdom Parliament have an interest in the issue referred to the Court being determined so that they may know, when casting their votes, whether that Parliament has not only the options of either accepting or rejecting the withdrawal agreement but also of deciding that the United Kingdom should revoke the notification made on 29 March 2017 (see in particular reference, paragraphs 8 to 10, and the first Opinion attached thereto, paragraphs 5 to 7).
3. Also, the referring court takes the view that, under applicable national law, anyone can by way of action of declarator apply to the courts to determine what the law is in a given situation. It is only for practical reasons that the court cannot be asked to determine hypothetical or academic questions. However, where there is some dispute about a matter and where a declarator is designed to achieve some practical result, the court must determine the issue. The referring court further takes the view that its jurisdiction in public law matters is not confined to the review of decisions or failures to act of a public body such as, in the case before it, the United Kingdom Parliament. A declarator, based on guidance from the Court of Justice in the context of the present request for a preliminary ruling, would therefore not put into question the legality of any act or omission of that Parliament but would rather declare the law without the United Kingdom Parliament being legally bound by that declarator (see

in particular reference, paragraph 10, and the first Opinion attached thereto, paragraphs 21, 22, 26 and 28).

4. The Commission recalls that, in accordance with settled case-law of the Court, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a 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 of EU law, the Court is in principle bound to give a ruling (see, in particular, judgments of 21 January 2003, *Bacardi-Martini*, C-318/00, EU:C:2003:41, paragraph 41, of 12 June 2008, *Skatteverket*, C-458/06, EU:C:2008:338, paragraphs 23 and 24, of 24 April 2012, *Kamberaj*, C- 571/10, EU:C:2012:233, paragraph 40 and the case-law cited, and of 16 June 2015, *Gauweiler and Others*, C- 62/14, EU:C:2015:400, paragraph 24).
5. Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, in particular, judgment of 17 July 2014, *YS and Others*, C- 141/12 and C- 372/12, EU:C:2014:2081, paragraph 63).
6. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated 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 to it (see judgments of 24 April 2012, *Kamberaj*, C- 571/10, EU:C:2012:233, paragraph 42 and the case-law cited, of 16 June 2015, *Gauweiler and Others*, C- 62/14, EU:C:2015:400, paragraph 25 and of 26 April 2017, *Stichting Brein*, C- 527/15, EU:C:2017:300, paragraph 56 and the case-law cited).
7. Also, in determining whether a reference is made by a ‘court or tribunal’ for the purposes of Article 267 TFEU (see, inter alia, the judgments of 14 June 2011, *Miles and Others*, C-196/09, EU:C:2011:388, paragraph 37 and case-law cited, and of 31 January 2013, *Belov*, C-394/11, EU:C:2013:48, paragraph 38), the Court assesses

whether there is a case pending before a court or tribunal and whether it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, *inter alia*, orders of 5 March 1986, *Greis Unterweger*, 318/85, EU:C:1986:106, paragraph 4, and of 26 November 1999, *ANAS*, C-192/98, EU:C:1999:589, paragraph 21; and judgment of 19 December 2012, *Epitropos tou Elegktikou Synedriou*, C-363/11, EU:C:2012:825, paragraph 19).

8. The Commission notes that it clearly follows from the explanation given by the referring court itself that the decision it has to give in the form of a declarator does not produce any legally binding effects on the parties to the main proceedings. It would not legally oblige the UK Secretary of State for exiting the European Union, respondent in the main case, or the UK Government of which he forms part, to consider the possibility of a revocation of the notification of withdrawal, whether or not that possibility legally exists. It would also not bind the petitioners, in particular members of the UK Parliament or the UK Parliament itself to act in any particular way. Rather, under the applicable national law, the declarator would be limited to restating the interpretation of Article 50 TEU that would be given by the Court of Justice.
9. In other words, while a preliminary ruling by the Court of Justice in the present case would without doubt be relevant for the formulation of the declarator to be issued by the referring court, that declarator remains, in the context of the main proceedings, purely advisory in nature.
10. On the basis of the case law cited above, it therefore appears doubtful whether the proceedings before the referring court can lead to a "judgment" within the meaning of the second paragraph of Article 267 TFEU. That notion is indeed an autonomous concept of Union law. It must therefore receive an interpretation based only on the terms and the objectives of the Treaties, including Article 19(1) TEU pursuant to which the Court shall ensure that in the interpretation and application of the Treaties the law is observed (Article 19(1) TEU). As the Court has decided, it is not the duty assigned to the Court by Article 267 TFEU to deliver advisory opinions on general or hypothetical questions but to assist in the administration of justice in the Member States (judgment of 12 June 2008, *Skatteverket*, C-458/06, EU:C:2008:338, paragraph 26 and case-law cited).

11. The Commission is aware that in order to give full effect to the cooperation which must prevail in the exercise of the functions assigned by Article 267 TFEU to the national courts and to the Court of Justice, the Court gives a broad interpretation to the conditions of admissibility enshrined in Article 267 TFEU, including the term ‘give judgment’, in order to avoid questions of Union law being excluded from consideration by the Court (see, to that effect, judgments of 17 February 2011, *Weryński*, C-283/09, EU:C:2011:85, paragraphs 41 and 42, and of 11 June 2015, *Fahnenbrock and Others*, C-226/13, C-245/13, C-247/13 and C-578/13, EU:C:2015:383, paragraph 30). It is also true that the spirit of cooperation, which must prevail in the exercise of the functions assigned by Article 267 TFEU to the national courts and to the Court of Justice, requires the Court of Justice to have regard to the particular responsibilities of the national court while at the same time the national court, in the use which it makes of the possibilities offered by that article, must have regard to the particular function entrusted to the Court of Justice (see, to that effect, judgment of 12 June 2008, *Skatteverket*, C-458/06, EU:C:2008:338, paragraphs 26 and 32 and case-law cited).
12. The Commission notes in this context that it certainly cannot be entirely excluded that a situation may arise in which the question put by the referring court would be legally relevant for decisions that may have to be taken by authorities of the United Kingdom or by EU institutions. However, such a possibility appears, at this stage, to be somewhat hypothetical. In addition, any of the relevant decisions would in any event not be taken by the parties to the main proceedings, at least not individually. It therefore remains the case that the declarator to be issued by the referring court and hence also the ruling of the Court in the present proceedings could only be characterised as an advisory opinion.
13. In view of the considerations set out above, the Commission has doubts as to whether the present request for a preliminary ruling should be regarded as admissible. In case the Court should find it admissible, however, the Commission sets out below the position it would take on the substance of the issue raised by the referring court.

2. CONSIDERATION OF THE QUESTION REFERRED

14. The referring court asks whether Article 50 TEU is to be interpreted as meaning that a Member State having made a notification under Article 50 TEU can unilaterally

revoke that notification, and if so, under what conditions and with what legal effect in relation to the membership of that Member State in the European Union¹.

15. Article 50 TEU is silent as to whether, after having submitted a notification of withdrawal from the Union but before withdrawal becomes effective, the withdrawing Member State can revoke its notification and, if so, under what conditions. The answer to that question must therefore be found by a systematic and teleological interpretation of the rules of the Treaties.
16. Under Article 50(1) TEU, the decision to withdraw from the Union is an internal act of the Member State concerned, which that Member State adopts “in accordance with its own constitutional requirements”. The notification which that Member State submits to the European Council in accordance with the first phrase of Article 50(2) TEU and which triggers the application of the procedure provided for in Article 50(2) to (4) TEU, is a similarly unilateral act. Article 50 TEU does not require any prior consultation with Union institutions or the remaining Member States, let alone their prior agreement before the Member State concerned can notify the European Council of its intention to withdraw from the Union. Nor does the notification have to set out any reasons for its decision to do so. It follows that, even though the Member State concerned is bound by the principle of sincere cooperation under Article 4(3) TEU, the right of withdrawal from the Union is a unilateral right of each Member State.
17. However, Article 50(2) to (4) TEU make it clear that, once the withdrawing Member State has submitted its notification to the European Council, a process is set in motion which is no longer subject to unilateral decisions of the withdrawing Member State. Rather, this process is driven by acts of the EU institutions, in part in agreement with the withdrawing Member State but without the withdrawing Member State participating in the decision-making in the European Council or the Council. Also, as the Court has already noted (judgment of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraph 46), by submitting a notification to the European Council in accordance with the first phrase of Article 50(2) TEU, the withdrawing Member

¹ In its notification under Article 50 TEU, the United Kingdom has notified its intention to withdraw from the European Union and from the European Atomic Energy Community. Withdrawal from the Union indeed implies necessarily also withdrawal from that Community, given the intrinsic institutional link between the Euratom and the EU (see, in particular, Article 106a(1) TEAC). In what follows, reference to withdrawal from the Union implies also withdrawal from the European Atomic Energy Community.

State sets in motion an automatic procedure: two years after that notification, the Treaties cease to apply to the withdrawing Member State, which will therefore automatically no longer be a member of the European Union. The only exception to this automaticity relates to the date on which the Treaties cease to apply to the withdrawing Member State. Indeed, that date can be modified either by a decision of the European Council, taken by unanimity and in agreement with the withdrawing Member State, or by a withdrawal agreement if it is concluded between the Union and the withdrawing Member State before the end of the two year period.

18. This shows that the Treaties establish a fine balance between the rights of the Member State that wishes to withdraw from the Union and those of the remaining Member States. Where a Member State considers that it should no longer take part in the process of European integration, it can take that decision internally and unilaterally, taking due account of all consequences which will follow from such a decision. Also, the procedure provided for in Article 50 TEU has been devised in such a way that remaining Member States cannot prevent the Member State wishing to withdraw from the Union from doing so.
19. Once, however, a Member State has officially triggered the process of withdrawal with the notification to the European Council, Article 50 TEU provides for a bilateral process between the Union and the withdrawing Member State during which the withdrawing Member State can no longer unilaterally revoke its notification.
20. The opposite position would fundamentally alter the balance established by Article 50 TEU.
21. Indeed, the short period of two years between date of the notification under the first phrase of Article 50(2) TEU and the date on which the Treaties cease to apply to the withdrawing Member State aims to avoid the Union being plunged into a long lasting, potentially unlimited period of serious social, economic and institutional disruption. Article 50 TEU therefore makes it clear that the arrangements for the withdrawal of that Member State from the Union are to be negotiated and concluded between the Union and the withdrawing Member State as a matter of utmost urgency.
22. An interpretation of Article 50 TEU different from that proposed by the Commission would however jeopardise the *effet utile* of that provision. Indeed, it would allow the withdrawing Member State to revoke its notification unilaterally at any time during the negotiation of the withdrawal agreement, including until the last day before the

end of the two year period, in case it considers that the outcome of the negotiations or a situation in which it would leave the Union without the conclusion of a withdrawal agreement are not favourable to it. Given that, as shown above, the Treaties grant to the Member States a unilateral right to decide to withdraw from the Union, it could not be excluded that, after having revoked its notification, the Member State concerned would submit once again a notification under the first phrase of Article 50(2) TEU, triggering another deadline of two years. An interpretation of Article 50 TEU which would allow the withdrawing Member State to simply “stop the clock” would achieve a result which the authors of the Treaties manifestly sought to avoid.

23. Such an interpretation of Article 50 TEU would obviously put the Union in an unfavourable position during the negotiation of the withdrawal agreement. Indeed, it would allow the withdrawing Member State to refuse to negotiate with the Union in good faith by keeping open the option of interrupting the negotiations and prolonging the process by a purely “tactical” revocation.
24. In addition, as the Court has decided (judgment of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraphs 45 to 48), as long as the withdrawal has not become effective, EU law continues to apply in full force and effect in the withdrawing Member State. Hence, it is of the utmost importance for authorities in Member States, for operators and for citizens as well as for the EU institutions to have, to the greatest extent possible, clarity about the applicable rules in their dealings with the withdrawing Member State. It is for that purpose that arrangements for the withdrawal should be concluded in due time between the Union and the withdrawing Member State, or that, in the absence of a withdrawal agreement, appropriate measures should be taken to prepare in the best possible way for the entry into force of the new legal situation resulting from the withdrawal of the Member State concerned. In an exceptional situation in which the withdrawing Member State would decide to reverse the process of withdrawal and revoke its initial notification, it appears even more important that this is done in an orderly way. An orderly way of dealing with such an exceptional situation could only be ensured if a revocation of the withdrawal is subject to a bilateral decision making process. If it were possible for the withdrawing Member State to unilaterally revoke its notification until the very end of the period provided for in Article 50(3) TEU, the interest of authorities of the

remaining Member States, of operators and of citizen as well as of the EU institutions in having as much legal certainty as possible would be seriously jeopardised.

25. The Commission therefore considers that Article 50 TEU cannot be interpreted as meaning that it grants the withdrawing Member State a unilateral right to revoke its notification.
26. At the same time, the purpose of Article 50 TEU is not to force a Member State to leave the Union but to grant to Member States a right to do so. Therefore, the Commission considers that, in case the Member State decided, in exceptional circumstances, to reverse its initial internal decision and to confirm its willingness to continue to take part in the process of European integration by definitively revoking its notification under Article 50 TEU, that provision must be interpreted in such a way as to provide for a mechanism which allows such a new state of affairs to be accommodated, having due regard to the principle of legal certainty and the need to avoid the undue consequences set out above.
27. Since such a mechanism is not explicitly provided for in Article 50 TEU, it must be established by systematic interpretation.
28. The Commission considers that an analogy should be drawn for that purpose with Article 50(3) and (4) TEU which grant the European Council the possibility to decide, by unanimity without participation of the withdrawing Member State, to extend the two year period.
29. Alternative interpretations do not appear to be convincing. On the one hand, such an act should not be made subject to an approval by the Member States in accordance with their respective constitutional requirements. Such a procedure would indeed only apply, in accordance with Articles 50(5) TEU and 49, in case the Member State has effectively withdrawn but would want to rejoin the Union. In the exceptional scenario of a revocation of the notification under the first phrase of Article 50(2) TEU, however, that Member State has not left the Union and would, if revocation were to become effective, remain a Member State. Also, at no stage in the procedure provided for in Article 50 TEU is an approval by the Member States in accordance with their respective constitutional requirements foreseen, notably because of the need to take decisions speedily. It would therefore also not be consistent to make the taking effect of such a revocation subject to an approval by the Member States in

accordance with their respective constitutional requirements. On the other hand, it would also not appear consistent to draw an analogy with the procedure provided for the conclusion of the withdrawal agreement, where the Council acts by qualified majority, after obtaining the consent of the European Parliament. Indeed, the arrangements for withdrawal, important though they certainly are, are only a consequence of the decision of principle, namely to withdraw from the Union, whereas the decision to give effect to the revocation of the notification to withdraw from the Union would have definitive effects of fundamental importance for the Union. That decision should therefore be subject to a unanimous decision by the European Council.

30. Therefore, the Commission takes the view that Article 50 TEU should be interpreted as meaning that if a Member State which has initially notified the European Council of its intention to withdraw from the Union subsequently notifies the European Council of its decision to reverse its initial decision and confirms its willingness to continue to take part in the process of European integration by definitively revoking its notification under Article 50 TEU, it is for the European Council, acting by unanimity without the participation of the withdrawing Member State but in agreement with that Member State, to accept the revocation with the effect that the Member State remains a member of the European Union.
31. Such an interpretation cannot be put into question by reference to the use of the term “intention” in the first phrase of Article 50(2) TFEU. Indeed, it is clear from the very wording of the first phrase of Article 50(2) TFEU that this provision does not foresee a mere communication of the political intention to leave the Union. Rather, it provides for a formal notification to the European Council – consisting of the Heads of State or Government of the Member States, together with its President and the President of the Commission (Article 15(2) TEU) – of a decision taken by that Member State, in accordance with its constitutional requirements, to no longer be a member of the Union. This formal notification sets in motion a process which ineluctably leads to the end of membership of the Union. It is not the mere start of political consultations.
32. Also, it cannot be argued that Article 50 TEU leaves a legal gap that must be filled by reference to the rules of the Vienna Convention on the Law of Treaties (VCLT), in particular Article 68 thereof which provides that a “notification or instrument

provided for in article 65 or 67 may be revoked at any time before it takes effect”.

The rules for the withdrawal from the Union are laid down in Article 50 TEU. Any possible legal gaps would have to be filled, in principle, by a systematic and teleological interpretation of the Treaties. This position is in harmony with Article 54 of the VCLT which, in essence, provides as a basic rule that a party may withdraw from a treaty “in conformity with the provisions of the treaty”, which in the case of Union law refers to the provisions of Article 50 TEU. Indeed, as shown above, it follows from a systematic and teleological interpretation of Article 50 TEU that, once a Member State has issued a notification under the first phrase of Article 50(2) TEU, it cannot unilaterally revoke its notification before it takes effect. In such a situation, even assuming that Article 68 VCLT has the status of customary international law, it can, in any event, not apply: where the treaty in question – here the EU Treaties and in particular Article 50 TEU – provides itself for the relevant rules, including as regards the notification or the instrument to accomplish the withdrawal, possibly in conjunction with other procedural steps, in conformity with Article 54(a) VCLT, such notification or instrument cannot be considered as “provided for in Article 65 or 67 VCLT” in the sense of Article 68 VCLT.

33. Finally, it can also not be maintained that the interpretation proposed by the Commission would have as a potential consequence that a Member State would be expelled from the Union even if, after a change in the state of affairs, it had clearly indicated its intention to remain a member of the Union. Indeed, the position of the Commission is that the notification of the intention to withdraw from the Union cannot be revoked unilaterally. However, in the interpretation proposed by the Commission, that principle is accompanied by an exceptional safeguard allowing the European Council to accept a notification of revocation in case of a change of state of affairs as described above. Such an act of the European Council appears indeed required to ensure legal certainty in a process which has been triggered in the first place by the withdrawing Member State.

4 CONCLUSION

34. On the basis of these observations, should the Court decide to answer the question put to it by the Court of Session, the Commission would suggest that it reply as follows:

"Article 50 TEU is to be interpreted as meaning that a Member State having made a notification under Article 50 TEU cannot, before withdrawal has taken effect, unilaterally revoke that notification. However, if that Member State notifies the European Council of its decision to reverse its initial decision and confirms its willingness to continue to take part in the process of European integration by definitively revoking its notification under Article 50 TEU, it is for the European Council, acting by unanimity without participation of the withdrawing Member State, to accept the revocation with the effect that the Member State remains a member of the European Union".

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