



Council of the European Union

Brussels, 29 October 2018

SGS18/08284

TO THE PRESIDENT AND THE MEMBERS  
OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

## WRITTEN OBSERVATIONS

lodged pursuant to Article 23, second paragraph of the Statute of the Court of Justice

by the

**COUNCIL OF THE EUROPEAN UNION,**

represented by Mr Hubert LEGAL, Mr Jean-Baptiste LAIGNELOT and Ms Jeanette CIANTAR, respectively Director General, Director and legal adviser in the Council Legal Service, as Agents, having agreed that service may be effected on them via e-Curia or, failing that, at fax No +32.2.281.56.56 and, where necessary, at the following address: Council of the European Union, Registry of the Legal Service, for the attention of Mr Hubert LEGAL, Mr Jean-Baptiste LAIGNELOT and Ms Jeanette CIANTAR, rue de la Loi, 175, 1048 Brussels,

### **in Case C-621/18**

in a Reference to the Court, pursuant to Article 267 TFEU, made by the Court of Session in Scotland in the course of proceedings before the latter Court between

**Andy Wightman MSP and Others**

and

**Secretary of State for Exiting the European Union,**

for a preliminary ruling on the interpretation of Article 50 of the Treaty on the European Union (TEU).

## I. INTRODUCTION

1. The preliminary reference arises from a petition before the referring Court, whereby the applicants seek a declaration specifying whether, when and how the notification submitted by the Prime Minister of the United Kingdom to the President of the European Council on 29 March 2017 under Article 50 TEU can unilaterally be revoked.
2. The question referred to the Court of Justice is the following: "*Where, in accordance with Article 50 of the Treaty on European Union, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?*". The request for preliminary reference was notified to the Council on 5 October 2018.

## II. LEGAL, PROCEDURAL AND FACTUAL BACKGROUND

3. Article 50 of the TEU provides for the legal basis by means of which an EU Member State, having decided to withdraw from the European Union, may notify the European Council of its intention:

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

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

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

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

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

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

4. On 29 March 2017, the European Council received the notification provided for in Article 50 TEU by the United Kingdom of its intention to withdraw from the European Union and Euratom<sup>1</sup>. The notification allowed for the opening of negotiations with the European Union, as foreseen by the Treaty.
5. On 29 April 2017, the European Council (Article 50) adopted the first set of Guidelines defining the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the Union would pursue throughout the negotiations<sup>2</sup>.
6. Following that, on 22 May 2017, the Council (Article 50) adopted a decision authorising the Commission to open negotiations, on behalf of the Union, for an agreement with the United Kingdom setting out the arrangements for its withdrawal from the European Union and from the European Atomic Energy Community, taking account of the framework for its future relationship with the Union, and nominating the Commission as Union negotiator<sup>3</sup>. That decision is currently under judicial review before the General Court in the case T-458/17, *Shindler e.a. versus Council*<sup>4</sup>.
7. The Council (Article 50) also adopted directives for the negotiation of an agreement with the United Kingdom setting out the arrangements for its withdrawal from the European Union<sup>5</sup>; as well as a separate decision establishing an ad hoc working party that would assist the Council and the Committee of Permanent Representatives of the Governments of the Member States (COREPER) in matters pertaining to the UK's withdrawal from the Union<sup>6</sup>.

---

<sup>1</sup> Annex 1 - Doc. XT 20001/17, available online (<http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>).

<sup>2</sup> Annex 2 - Doc. EUCO XT 20004/17, available online (<http://data.consilium.europa.eu/doc/document/XT-20004-2017-INIT/en/pdf>).

<sup>3</sup> Annex 3 - Doc. XT 21016/17, available online (<http://data.consilium.europa.eu/doc/document/XT-21016-2017-INIT/en/pdf>) and XT 21016/17 COR 1, available online (<http://data.consilium.europa.eu/doc/document/XT-21016-2017-COR-1/en/pdf>).

<sup>4</sup> Action brought on 21 July 2017 — *Shindler and Others v Council* (Case T-458/17), OJ 16.10.2017 C 347/39, whereby the applicants claim that the General Court should annul Council Decision (EU, Euratom) XT 21016/17 of 22 May 2017, together with the annex XT 21016/17, ADD 1 REV 2 to that decision.

<sup>5</sup> Annex 4 - Doc. 21016/17 ADD1 REV2, available online (<http://data.consilium.europa.eu/doc/document/XT-21016-2017-ADD-1-REV-2/en/pdf>).

<sup>6</sup> Annex 5 - Doc. XT 21017/17 + COR 1, Council Decision (EU) 2017/900 of 22 May 2017 concerning the establishment of the ad hoc Working Party on Article 50 TEU chaired by the General Secretariat of the Council, OJ L 138, 25.5.2017, p. 138–139. Also available online (<http://data.consilium.europa.eu/doc/document/XT-21017-2017-INIT/en/pdf>, <http://data.consilium.europa.eu/doc/document/XT-21017-2017-COR-1/en/pdf>).

8. On 15 December 2017, the European Council (Article 50) considered that sufficient progress on the first phase of the negotiations had been made, and adopted its second set of Guidelines to move to the second phase of negotiations to discuss a transition period and the framework for the future relationship<sup>7</sup>.
9. On 29 January 2018, the Council (Article 50) adopted a decision supplementing the Council Decision of 22 May 2017 containing, in Annex, supplementary directives for the negotiation of an agreement with the United Kingdom setting out the arrangements for its withdrawal from the European Union, detailing the EU-27 position regarding a transition period<sup>8</sup>.
10. On 23 March 2018, the European Council (Article 50) adopted the third set of Guidelines with a view to the opening of negotiations on the overall understanding of the framework for the future EU-UK relationship, that would be elaborated in a political declaration accompanying and referred to in the Withdrawal Agreement<sup>9</sup>.
11. Against this background, the negotiations between the United Kingdom and the Union negotiator developed.

### **III. OBSERVATIONS ON POINTS OF LAW**

#### **A) On the scope of the competence of the Court to rule on the question referred:**

12. The Council makes no observations regarding the admissibility of the reference and the hypothetical nature of the answer to the question being sought. The referring Court seems to acknowledge implicitly that the answer to the question is not necessary to resolve a legal dispute, but is primarily intended to clarify the position for the Members of the United Kingdom Parliament when casting their votes under the European Union (Withdrawal) Act 2018<sup>10</sup>.

---

<sup>7</sup> Annex 6 - Doc. EUCO XT 20011/17, European Council (Art. 50) meeting (15 December 2017) - Guidelines, available online (<http://data.consilium.europa.eu/doc/document/XT-20011-2017-INIT/en/pdf>)

<sup>8</sup> Annex 7 - Doc. XT 21004/18, available online (<http://data.consilium.europa.eu/doc/document/XT-21004-2018-INIT/en/pdf>); doc. XT 21004/18 COR 2, available online (<http://data.consilium.europa.eu/doc/document/XT-21004-2018-COR-2/en/pdf>) and doc. XT 21004/17 ADD1 REV2, available online (<http://data.consilium.europa.eu/doc/document/XT-21004-2018-ADD-1-REV-2/en/pdf>).

<sup>9</sup> Annex 8 - Doc. EUCO XT 20001/18, available online (<http://data.consilium.europa.eu/doc/document/XT-20001-2018-INIT/en/pdf>)

<sup>10</sup> See paragraph 10 on page 3 of the form of reference by the Court of Session in Scotland. Moreover, in the proceedings before the referring Court, the petitioners have argued that if a decision to remain was available as a matter of EU law, the UK parliament could pursue that option irrespective of the policy of the UK Government (see Opinion of the Lord President in the reclaiming motion, paragraph 11, page 5).

13. The Court of Justice has ruled that its role under Article 267 TFEU is "*not to formulate advisory opinions on general or hypothetical questions but to assist in the administration of justice in the Member States by providing a useful and correct interpretation of EU law*"<sup>11</sup>.
14. The Council respectfully defers to the wisdom of the Court on this matter, which is exclusively one to be decided between judges.

**B) On the Interpretation of Article 50 TEU: can a notification under Article 50 TEU be revoked unilaterally?**

15. Before examining the substance of the question raised by the referring Court, it is necessary to analyse the scope, nature and effects of a notification made under Article 50 TEU. The Council will address these in turn by first looking at the intended scope of Article 50 TEU, followed by the effects that a notification under Article 50(2) TEU produces.

**(i) What does Article 50 TEU seek to do?**

16. Article 50 TEU provides a complete set of rules which deal with the withdrawal of a Member State from the Union with the objective of enabling an orderly withdrawal. It introduces the procedure that is to be followed in the event that a Member State decides to withdraw from the European Union. The Council submits that the legal process foreseen in Article 50 TEU sets out to defend the institutional interests of the Union and to provide legal certainty to the process of withdrawal<sup>12</sup>.
17. Firstly, a distinction ought to be made between the decision of a Member State to withdraw from the Union in accordance with its own constitutional requirements foreseen in Article 50(1) TEU; and the notification by that Member State to the European Council of that decision to withdraw from the Union, as foreseen in Article 50(2) TEU.
18. Whereas the first paragraph of Article 50 TEU specifies the right of a Member State to withdraw from the Union, the second paragraph of Article 50 TEU and the paragraphs that follow it, on the contrary, set a process in motion whereby the EU institutions and systems are activated. Indeed, Article 50(2) TEU establishes how that right is exercised within the EU

---

<sup>11</sup> See Case C-614/14, *Criminal proceedings against Atanas Ognyanov* [2014] ECLI:EU:C:2016:514, paragraph 47. See also the judgment in *Konstantinides*, C-475/11, EU:C:2013:542, paragraph 61; and the orders in *Mlamali*, C-257/13, EU:C:2013:763, paragraph 32; and *Szabó*, C-204/14, EU:C:2014:2220, paragraph 22 et seq.

<sup>12</sup> Indeed, and in contrast to the situation that existed prior to the entry into force of the Lisbon Treaty, Article 50 TEU explicitly regulates the withdrawal of a Member State from the European Union and as such, it is a '*lex specialis*' specific to the EU legal order.

sphere and triggers a process within the EU system that results as a consequence of that notification<sup>13</sup>.

19. The notification under Article 50(2) TEU of the decision of that Member State to withdraw from the Union therefore puts the withdrawal process - which, until then, had remained a process that was internal to the constitutional processes of that Member State - into the scope of EU law and action<sup>14</sup>.
20. Moreover, no consequences are to be drawn from the terms "*[a] Member State which decides to withdraw shall notify the European Council of its intention* [emphasis added]" in Article 50(2) TEU. Article 50 TEU contains a chronological sequence according to which the notification in Article 50(2) TEU follows a Member State's unilateral decision to withdraw from the Union. Thus the term '*intention*', which Article 50(2) TEU contains, does not constitute an indication that the intended withdrawal may be conditional, tentative or otherwise incomplete, but solely reflects the fact that the Member State's unilateral decision to withdraw may not lead to an immediate separation upon notification. That the withdrawal is intended does not imply that it is not yet finally decided. The form of words used in the provision also serves to show that a decision of a Member State to withdraw from the Union under Article 50(1) TEU produces automatic effects in the EU legal order only through the notification foreseen by Article 50(2) TEU.
21. The legal framework for the withdrawal of a Member State from the Union is composed of Article 50 TEU and the provisions it refers to, as supplemented by the Guidelines provided by the European Council. There is a process in which the EU institutions are involved as from the moment a Member State notifies its intention to withdraw from the Union under Article 50(2) TEU.
22. The fact that the matter stops being a unilateral process as from the moment of notification and that the notification has the effect of tilting the balance in favour of safeguarding the interests of the Union, can also be demonstrated by the fact that Article 50(3) TEU provides that the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. The mere existence in the Treaty of such a fixed

---

<sup>13</sup> In a sense, one can say that Article 50 TEU allows the EU to coordinate its position and to limit the discretion of the withdrawing Member State in the process. See also Ciosa C., '*Interpreting Article 50: exit and voice and...what about loyalty?*', EUI Working Paper, RSCAS 2016/71, p. 7.

<sup>14</sup> Moreover, whereas Article 50(1) TEU refers to a decision to withdraw taken in accordance with the constitutional requirements of that Member State, Article 50(2) TEU makes no such distinction and hence the notification is binding on the EU and the EU is not called to question that process.

period of time is, in itself, an indication that the notification triggers a process for which there is no discretion to reverse. An extension of the two-year time period requires a decision of the European Council and this decision must also be taken unanimously by the other Member States, without the withdrawing Member State having a particular role to play in this regard other than to agree to the extension. If the withdrawing Member State does not agree, then the Treaties will cease to apply two years after the notification referred to in Article 50(2) TEU.

23. The Treaties therefore foresaw that the EU institutions should retain full control over the process once the notification to the European Council referred to in Article 50(2) TEU, is made.
24. Secondly, the Council submits that the notification under Article 50 TEU was also foreseen by the drafters of the Treaty to instil a degree of legal certainty to a process that could in itself, be seen to create a high degree of uncertainty.
25. This can be seen from a proper reading of Article 50(3) TEU which has as its scope to bring an end to the period of time between the moment at which the withdrawing Member State has triggered the EU process to withdraw from the Union and the actual date of its withdrawal. Hence Article 50(3) TEU attempts to put an end to any uncertainty that could be created: if, after the two-year period from notification, the withdrawal agreement has not yet entered into force, then the Treaties will nevertheless cease to apply to that Member State.
26. The duration of the process of withdrawal therefore cannot be subject to the discretion of a single Member State. Article 50(3) TEU addresses this point and brings an automatic end to the process. The only exception to this rule, as explained above, is if the European Council unanimously decides to extend this period, in agreement with the Member State concerned.
27. Thirdly, the absence of a specific reference in the Treaty of the right to revoke the notification made under Article 50(2) TEU should not lead to the assumption that a unilateral revocation is possible or that it can be inferred from the provisions of the 1969 Vienna Convention on the Law of the Treaties (VCLT)<sup>15</sup>. Article 50 TEU could only be interpreted by analogy to the VCLT if its legal implications were not clear. It has been shown above that not only are the implications of Article 50 TEU clear, but also that Article 50 TEU is itself intended to regulate a process that could have given rise to uncertainty if it had been

---

<sup>15</sup> Namely, Article 68 of the Vienna Convention on the Law of the Treaties, which provides that: “A *notification or instrument provided for in Article 65 or 67 may be revoked at any time before it takes effect*”.

conducted under the general rules of international law. No conclusions can therefore be drawn from the VCLT on unilateral revocations of notifications to withdraw from a Treaty.

28. For the reasons set out above, it appears that the drafters of the Treaty had not intended to permit a notification made by a Member State to withdraw from the European Union under Article 50(2) TEU to be withdrawn unilaterally by that Member State.

**(ii) Notification under Article 50(2) TEU produces legal effects**

29. The Council further submits that once a Member State has notified its intention to withdraw from the European Union pursuant to Article 50(2) TEU, apart from bringing the withdrawal process within the scope of EU law, that notification also has the result of producing legal effects within the EU legal order. Consequently, that notice may not be revoked unilaterally by the Member State in question.
30. Firstly, as described above, the notification by the United Kingdom of its intention to withdraw from the Union gave rise to a series of decisions adopted to allow for the negotiations to be opened and properly conducted. Thus, the notification made by the United Kingdom to the European Council on 29 March 2017 resulted in the adoption of a set of European Council Guidelines and Council Decisions<sup>16</sup>.
31. Secondly, the UK no longer sat in meetings of the Council and its preparatory bodies that discussed its withdrawal : a specific so-called 'Article 50' format was created for Council meetings, COREPER as well as the ad hoc working party that was specifically set up for this purpose. A notification by a Member State of its intention to withdraw under Article 50(2) TEU therefore produces results in the EU legal sphere and institutional set-up that could be seen almost immediately after notification - one need not wait until the period described in Article 50(3) TEU, for the effects of that notification to start being felt.
32. The decisions adopted by the Union in this format at 27 following notification, have led to the adoption of binding legal acts that were not merely preparatory in nature. A notification made under Article 50(2) TEU hence is unequivocally a measure which produces legal effects within the EU legal order.
33. Thirdly, the Council would even go further: not only has the United Kingdom's notification of its decision to withdraw from the Union resulted in the ongoing negotiations under Article 50 TEU, it has also led to the adoption of measures that were ancillary to the negotiation

---

<sup>16</sup> See paragraphs 5-10 above.



process but that needed to be undertaken by the EU-27 and that in themselves also produce legal effects. These include measures such as the relocation of the two Agencies located in the United Kingdom.

34. As the United Kingdom notified the European Council under Article 50 TEU of its intention to leave the Union, it was indeed necessary to move the two United Kingdom-based Agencies to other locations within the Union's territory. Accordingly, on 20 November 2017, the 27 Member States, meeting in the margins of the General Affairs Council (Article 50), selected Paris, France, as the new seat of the European Supervisory Authority (European Banking Authority) (EBA) and Amsterdam (the Netherlands) as the new location for the European Medicines Agency (EMA).
35. These decisions were not preparatory in nature and needed to be taken in assurance of the fact that the agencies could be set up on site and take up their functions at the date of the United Kingdom's withdrawal from the Union. It was not possible for the EU-27 to wait until the two-year time period was up. Actually, the process for relocation is therefore underway<sup>17</sup>. The relocation decisions are testament to the fact that the notification of the UK's withdrawal from the Union has produced legal effects even beyond the EU institutional setup onto third parties and external sources. The two Agencies will be relocated and the costs - not least the leasing costs for relocation which are currently the subject of a dispute before the United Kingdom Courts - will need to be addressed<sup>18</sup>.
36. A unilateral revocation of the United Kingdom of its notification to withdraw cannot have the effect of nullifying the measures referred to above - it is only the institution or body that adopted these measures that can repeal them and in any case even if such a possible repeal is contemplated, it will not have the effect of automatically removing the legal effects that these measures would have themselves created e.g. the costs incurred for the agencies to start their relocation process.

***(iii) Other reasons as to why notification under Article 50 TEU cannot be revoked unilaterally***

---

<sup>17</sup> Taking EMA as an example, the agency will move from London to Amsterdam before 29 March 2019, when the United Kingdom withdraws from the EU. The Dutch authorities have committed to building completely new, tailor-made premises for EMA which are expected to be available by Q3 2019. For an interim period until the new building is complete, EMA will occupy temporary premises in the area of Amsterdam.

<sup>18</sup> The same can be said in relation to the Council Decision (CFSP) 2018/1083 of 30 July 2018 to relocate the European Union Naval Force (EU NAVFOR) Operational Headquarters from Northwood (UK) to Rota (Spain), and to Brest (France) for the Maritime Security Centre Horn of Africa (MSCHOA) as from 29 March 2019 (Annex 9 - doc. 10568/18, available online: <http://data.consilium.europa.eu/doc/document/ST-10568-2018-INIT/en/pdf>).

37. There are also additional arguments to be made in favour of the argument that an Article 50 TEU notification cannot be revoked unilaterally.
38. Firstly, apart from the legal effects resulting from the notification and the measures adopted as a result, financial costs have been incurred by the Union and by the EU-27 in the context of the negotiations as well as in the context of the preparation for the withdrawal with or without the agreement reached in those negotiations. To argue that the United Kingdom could unilaterally revoke its notification under Article 50 TEU would seem to argue that the Union would need to bear the costs for the negotiations as well as for all the acts adopted as a consequence of that notification and of the preparation for the withdrawal. Not only has the Union incurred costs in negotiating the United Kingdom's withdrawal from the Union following its notification, but Member States too together with the institutions have had to prepare for the withdrawal of the United Kingdom from the Union and the impact this could have on citizens and businesses alike<sup>19</sup>. These preparations have entailed costs that would need to be borne entirely from the EU- or 27 Member States' budget should the United Kingdom unilaterally revoke its notification under Article 50(2) TEU.
39. Secondly, it would also seem to externalise the democratic decisions of a Member State but without any means of managing the effects of those decisions on other affected parties. A classic example of this is the decision that has been taken by the EU to open negotiations at the level of the World Trade Organization (WTO) for the apportionment of the Tariff Rate Quotas (TRQs). The United Kingdom's withdrawal from the Union will have effects on the relations of the United Kingdom and the Union with third parties, in particular in the context of the WTO of which both are original members.
40. Thus on 26 June 2018, the Council authorised the Commission to open formal negotiations within the WTO on how to divide up existing EU TRQs between the EU-27 and the United Kingdom. Should the United Kingdom have a unilateral right to revoke its notification under Article 50 TEU, this would entail the need for the EU to terminate or revoke the action it would have taken at the international level, purely on the basis of unilateral action by the United Kingdom beyond its control. As explained above, the scope and purpose of Article 50

---

<sup>19</sup> Various measures have been discussed at EU level with the Member States to cater for this eventuality: including for example, measures related to the adjustments to be made by the Customs authorities of each Member State to cater for the fact that the United Kingdom would become a third country; adjustments for VAT and IT systems; excise duties; accession by the UK to the Convention of 20 May 1987 on the simplification of formalities in trade in goods and the Convention of 20 May 1987 on a common transit procedure; amongst others. Moreover, some of the so-called 'preparedness' proposals will directly affect citizens and businesses once adopted. See, for example, the proposal for a Regulation of the European Parliament and of the Council complementing EU type-approval legislation with regard to the withdrawal of the United Kingdom from the Union (2018/0220 (COD)).

TEU would seem to argue the contrary: Article 50 TEU is there precisely to defend the interests of the institutions from unilateral action taken by one single Member State.

41. Finally and more importantly, linked to the above is the third additional argument against unilateral revocation, namely that, should it be possible for a withdrawing Member State to be able to revoke its Article 50 TEU notification unilaterally, this could give rise to the risk of abusive negotiations by that Member State (the 'moral hazard' argument). Indeed, allowing a withdrawing Member State to unilaterally revoke its notification under Article 50(2) TEU would render it possible for that Member State to unilaterally stop the withdrawal process and subsequently trigger it again with a fresh notification, thereby clearly circumventing the need for unanimity in the European Council for the prolongation of the two-year period foreseen in Article 50(3) TEU. Moreover, it has been argued in academic literature<sup>20</sup> that a unilateral right to revoke a notification under Article 50 TEU could give rise to a Member State using that right to gain leverage over policies that might be unpopular at the time. Apart from the legal argument to this that, as explained earlier, the letter of Article 50 TEU would not lend one to argue in favour of such an interpretation, one must also point out the political implications and risks that the existence of such a right would have to the development of EU policies. Indeed, such an interpretation may well leave the door open to strategic manipulation by the withdrawing Member State of the EU decision-making machine and affect its decision-making process as well as the EU constitutional architecture. It does not seem logical to argue that Article 50 TEU could have been devised by the drafters of the Treaty to be used for such purposes<sup>21</sup>. In any case, it appears that the whole Article 50 TEU process has serious consequences and should not be used lightly. A possibility to unilaterally revoke a notification under Article 50(2) TEU would undermine this objective.

**C) If the notification under Article 50 TEU cannot be unilaterally revoked, under what conditions can it be revoked?**

42. As explained above, it is the view of the Council that the notification by a Member State of its decision to withdraw from the European Union cannot be revoked unilaterally by the

---

<sup>20</sup> See, *inter alia*, Gatti, M. 'The Article 50 Procedure for Withdrawal from the EU: A Well-Designed Secession Clause'. Paper presented at the EU Studies Association (EUSA) Conference, Miami, 4-6 May 2017. Panel 3I – Brexit: Impact upon European Law and Integration, in <https://www.eustudies.org/conference/papers/download/431>. p. 10.

<sup>21</sup> Indeed, this argument would imply that a Member State could use the threat to leave to bring about a change in the direction of policy being taken by the EU. Not only would this run counter to voting systems such as the use of qualified majority voting foreseen in Articles 16 TEU and 238 TFEU which were perceived in order not to allow one Member State to veto a process of negotiations, but would also seem to render futile the processes contemplated in the Treaty for cases where such agreement to go forward as a bloc cannot be reached, such as the process for enhanced cooperation foreseen in Article 20 TEU. To its fullest extent, the argument would also seem to allow one Member State to use the Article 50 TEU process to bring about a change in the Treaties and threaten its withdrawal, in full circumvention of the process contemplated in Article 48 TEU.

withdrawing Member State. The logical question that follows is therefore under what conditions, if any, can a notification under Article 50(2) TEU be revoked?

43. To this question, the Council would respectfully submit that a notification submitted by a Member State expressing its intention to withdraw from the European Union can only, for the reasons explained above, lawfully be revoked following a unanimous decision of the European Council.
44. Although Article 50 TEU is silent on this point, the Council would submit that this line of argumentation can be inferred from a proper reading of that provision.
45. Indeed, as explained above, a notification under Article 50 TEU triggers a process that is set to defend the interests of the institutions and to grant legal certainty. The notification of the Member State sets a process in motion within the EU legal sphere and it is hence correct that Article 50(3) TEU foresees that any extension of the time period defined in that Article can only be extended if the European Council unanimously and in agreement with the Member State concerned decides for that period to be extended.
46. It is also not necessary for the withdrawing Member State to request the prolongation of the two-year time period foreseen in that Article. The initiative to extend need not necessarily come from the withdrawing Member State, all that is needed is the unanimous decision of the European Council to extend and the agreement from the withdrawing Member State that that particular course of action would be taken.
47. If the mere decision to prolong the time period is subject to the unanimous decision of the European Council, it would be reasonable to assume that the revocation of that notification would all the more require a unanimous decision of the European Council before it can be revoked. The notification made under Article 50(2) TEU is not taken in isolation of the processes in the EU legal sphere. On the contrary and as explained above, Article 50(2) TEU triggers a process in which the involvement of the EU institutions and bodies is central and hence would require the involvement of that same system before it can be brought to a halt. Of course it would be for the European Council to consider any request to revoke a notification made under Article 50(2) TEU, taking account of the circumstances under which the withdrawing Member State has decided to seek to revoke that notification.

#### IV. CONCLUSION

48. For these reasons, the Council respectfully asks the Court of Justice to reply as follows:

- Once a Member State has notified the European Council of its intention to withdraw from the European Union in accordance with Article 50 of the Treaty on the European Union, that notification may not be revoked unilaterally by the Member State in question;
- In order for that notification to be revoked, a unanimous decision of the European Council would be required.

Hubert LEGAL

Jean-Baptiste LAIGNELOT

Jeanette CIANTAR

Agents of the Council