**Notes from the hearing before the CJEU on 27 November 2018**

*Editorialising is in italicised script. This is intended to be a neutral Note and is incomplete but almost entirely verbatim.*

**The Petitioners**

*The Petitioners have produced a copy of their written statement which can be found elsewhere on this page. In the circumstances no separate record is made here.*

**The Additional Parties**

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**The United Kingdom Government**

The Petitioners consider that the question raises EU constitutional issues of the most profound nature. If a contested revocation were to come before the Court that might be correct. But it is the position of the UK Government that there will be no notice.

We read the Commission as agreeing with us on the question of admissibility.

As to the position of Petitioners, there is very little to respond to on the question of admissibility.

This case is a request for an advisory observation. The submissions of the Petitioners make this clear. The exceptional power to apply for an advisory opinion advises only in very limited circumstances, and only at the request of an EU institution or member state (Article 218(11)). The exam question posed by the Scottish court is hypothetical. The application is an attempt to rewrite the treaties.

This court’s conventional attitude to advisory questions provides an answer.

President: please speak more slowly.

In truth, what the Petitioners are looking for is not guidance… They want to use the answer to advance their political argument.

From a UK Government perspective this is a constitutional anathema. Any ruling which is used to shape domestic political debate would be unprecedented…

The constitutional doctrine of separation of powers is a fundamental adjunct to the rule of law. It requires all EU courts to refuse to become involved in matters of political controversy.

These concerns explain why I refuse to be drawn on the substance of the question. To do otherwise would offend against this very principle.

**The Council**

I will not address admissibility because this is a matter for the judges. The Council’s submissions are solely on substance.

I am here with an institutional message which is twofold. First the withdrawing MS should not have the choice to withdraw. Second the termination of the process should not be excluded if that termination receives the consent of all the other MSs.

This is a political message which is not surprising when a political institution takes a stance. But consistent with the Treaties.

My submission is that A50 is not ambiguous in its construction.

Any MS can take the unilateral right to leave the EU. It is a free choice with no substantive restrictions imposed by EU law. Withdrawal will happen at a date chosen by the MS itself.

The certainty of the duration is an essential protection for the Union in the process. Balances the liberty of members to separate but also for the EU institutional set up and legal order. Withdrawal should not jeopardise this balance. This is why the requirements of A50 must be interpreted solely in accordance with the provisions of EU law. Rules of international law have no place here. National processes alone have led to the initial decision. National processes cannot be used to pull the carpet on which everyone stands. The national processes were exhausted by putting the notification on the table. Notification is not made to the Council for deciding on it but just for adjusting to it.

All the Union side can do is try and frame the separation through negotiated arrangements but it cannot stop it unilaterally. The discretion to stop it cannot be unilaterally exercised by other side.

The Council’s position is not that withdrawal cannot be stopped. But just that it cannot be stopped unilaterally.

The pressure to conclude would be much reduced by the opening of the possibility to reconsider. This would encourage notifications if not frivolous but tentative or conditional. The two year period might become a pseudo convention meant to charm the notifying sheep back to the flock.

This is why Article 50 insists at paragraph 5 that once a notifying state is out it must go through the procedure for re-entry.

This might appear to be an extraordinary scenario… but its very existence in theoretical terms might affect the perceptions of the underlying rules of the game. The only exception is where there is an unanimous decision taken by the Council in agreement with the notifying member state.

To extend the withdrawal process and to end the process altogether are obviously not identical in law… Some reasoning by analogy is required here.

Were all MSs convinced that a MS acted in good faith in wishing to reverse its notification and all MSs were to agree no one in good senses would refuse. The Court alone holds the constitutional prerogative of interpreting primary law.

The court could provide a very useful contribution for the referring judge and the proper conduct of the work of the institutions I have more familiarity with.

**The Commission**

The case before you concerns a question which has given rise to much academic and political debate. It also raises the issue whether the court should answer a question concerning a provision of EU law. This court has on many occasions has insisted on the preface of the preliminary ruling procedure. And on the requirement that a preliminary reference is based on a need adherent in the effective resolution of the dispute.

In the case before the Court of Session there is no real dispute. The petitioners ask for guidance so that they can exercise

The answer won’t bind the Govt or the Petitioners to any particular action. In the view of the Commission, the Court will be taking a step further than it has taken to date. It is true that the Court has shown great flexibility in certain cases in which it is imperative to clarify the law in a given respect. The Commission can understand that such an approach is justified by the present case characterised by the fact first that the questions asked are of major constitutional importance and secondly those questions can become the subject of a major constitutional clash and it is unlikely the Court will have a further opportunity to consider them. The Commission would suggest if the Court wants to answer the question it should restrict the circumstances to cases of this nature.

The revocation of a notification of an intention to withdraw requires the consent of the Union. As the Council and Commission have said in their written observations [unilateral revocation] would open the possibility to revocation in an abusive manner. We have been told this morning that we should not be swayed by these catastrophic possibilities. But the question is not what the UK might do but what might happen under any circumstances.

Such an approach is warranted by the truly major consequences for the Union of a revocation. An extension of time is not a less serious matter than a revocation. A revocation must of major importance.

The petitioners and additional parties say that a member state must not be forced out against its will. It is that MS which has launched the process which normally leads to its departure. If the decision of the Council is needed it must be recorded that like the MSs the Council is bound by the principle of sincere cooperation. It would certainly not refuse to permit a MS to remain unless it had very serious consequences for doing so.

However the protection of the interests of the Union require that the final word would lie with the European Council.

The decision was taken in the constitutional convention was that Article 50 had to be introduced to make clear that a MS would be allowed to withdraw. It was also suggested that silence on the power of the Council to accept or reject. But one could reply that the fact Article 50 is silent would suggest no such right exists but the Institutions do not go so far.

As to the argument put forward that Article 50 was intended to reflect the procedures laid down in the Vienna Convention there are in fact very significant differences. A state first has to notify the other parties of its intentions to withdraw and its reasons. The other parties then have an opportunity to object. The procedure laid down by Article 50 only lays down one notification. Article 50 also provides for the process governing that withdrawal.

It may be added that the Vienna Convention provides that a party may withdraw from a treaty in accordance with the procedures set out in that treaty. That is what the authors of Article 50 have done. Therefore even if we have to have regard to the Vienna Convention we come to the same conclusion.

The position of the Commission is that A50 has to be read autonomously and in a purposive manner.

**Judge Rapporteur**

Question for Commission

You say on the one hand A50 is satisfied with a QMV when it comes to the exit conditions but you also say that once A50 has been triggered it can only be stopped with unanimity. What is the rational for this?

Answer

My Lord what is subject to QMV is the terms of the withdrawal agreement. So it is of lesser constitutional importance that the question whether the Member State stays or goes.

Question for the Commission

You say conditions required to avoid abuse but what are the other mechanisms that could control the abuse? Could the revocation come with conditions attached? Or could good faith and principle of loyal cooperation be enough?

Answer

You are asking whether some lesser mechanism could avoid abuse. That would involve a decision of the EC to lay down those conditions. It is hard to see how Article 50 could be read so imaginatively.

Question for the Commission

Members of the UK Parliament will vote. To what extent do you think the answer might be relevant to their considerations?

Answer

I think it has been well explained in the written observations that they are interested in whether they have a third option of accepting they have a deal or crashing out without a deal.

Question for Petitioners

On the legal effects of notification. You argue that consequence of revocation is to revert to status quo ante. Is this true at every stage of the notification or is there a point in time at which notification is no longer possible?

Answer

As I understand it there are two questions. From a purely legal matter of analysis revocation of that which was intended will result in a reversion to the status quo ante if the revocation is effective as a matter of law. You also ask questions about political consequences of a revocation which are above my pay grade. If the Withdrawal Agreement has been formally concluded in accordance with the EU’s constitutional requirements [ie including approval by the Parliament] then revocation can’t happen after that.

Question for the United Kingdom

What procedural steps will happen in the coming days?

Answer

So far as the UK Parliament is concerned it will have a Withhdrawal Agreement bill but a prior requirement for the brining of that bill which will be that meaningful vote conferred on the House of Commons.

Question

Are there several steps in this procedure?

Answer

The position will be that in the first instance there will be a meaningful vote before the Commons and a debate in the House of Lords. If the vote approves the deal a Bill will be brought before the House of Commons.

Questions from Advocate General

Question for Government

May I ask you for the position of the Government on the substance, the merits whether it is possible for unilateral revocation?

Answer

With respect to the Court the UK Government has no position on that matter before the Court.

Question from the Court

Question for Commission

You started off today by saying a few words about admissibility and said there seems to be no dispute – you have to correct me if I’m wrong but what is sought is a declaratory judgment. I would have thought you must have some special reason or interest in obtaining a declaratory judgment. And I would have thought there must be some sought of dispute. I see from the order for reference. There has to be some dispute over the matters sought to be resolved. I was intrigued by you saying there is no dispute and then, more importantly, do we have to interpret the position of the Commission if someone seeks a declaratory judgment only then at least as a general rule preliminary ruling requests would not be admissible.

Answer

The only dispute is whether or not a declarator should be given. There is no dispute about a question of UK law because the UK Government refuses to say. You might think that’s a bit artificial but if you ask what the position before the Court of Session is you have to say it’s difficult to identify a dispute.

This court has always said the question whether a court is a court is a matter of EU law. However I don’t go so far as to say no declaratory action could ever give rise to a question. There are declaratory judgments which give rise to binding effects on national administration. Here there are no binding effects.

Question for Commission from President Lenearts

You answer one party asks for a declarator. The other party opposes but on the substance that other party takes no position. But is that really the end of the story because if the Defendant takes no position there is no dispute but if it takes a position and loses there is a dispute. [Can it really dodge the issue by that mechanic.]

Answer

No there is some kind of dispute.

Question from Judge for Lord Keen

There is the principle of equality between member states and diversity between traditions. In this case we are talking about an aspect of the common law system. A declarator is a remedy whereby a right can be ascertained and declared. My question is, in terms of cooperation with national courts and respect for legal traditions, should this court really ignore and avoid answering the question that is asked. Should we not defer to that legal tradition?

Answer

There are circumstances in which a declarator could apply but this is not such a case. The declarator sought here is one directed to what is considered to be a hypothetical question.

This is not something which is entirely attributable to a common law system.

Essentially this action for declarator is not directed at the Secretary of State but is an attempt to circumvent the jurisdictional boundaries of this court.

Question for Government

Are you not loading your argument when you suggest that because this is politically supercharged we should not go there and whatever we do it will be perceived badly. And the Court may not be seen as an impartial arbiter. Are they the type of arguments this court should give any weight to.

Answer

One is reflected in observations of Commission. No matter how significant the issue the merits of that constitutional issue cannot shift the jurisdictional boundaries of this court. The observations made here were in the context of Parliamentary Privilege in the common law system but to respect the boundaries between the Executive and Legislator.

The Court should be conscious of the fact that this is a matter of charged political debate.

Question from Judge to Commission

Step back a bit from pleadings. They were largely on scenarios of abuse. I wonder whether beyond A50 there is a second substance matter which is Article 4(3) which would then mean that the real question for this court is to determine what would be the conditions under which the revocation could be made by the Member State wishing to do so and the conditions under which such a revocation would be accepted.

Answer

Article 4(3) is applicable to withdrawing MS and to Council. It implies that the withdrawing MS in good faith. It could not do it as a tactical matter or for negotiating advantage or experimental matter. Sorry that relates to the notification by the State.

Question from Judge

If due to changing majorities would that qualify as a serious change of circumstances allowing for revocation?

Answer

If there were real change of circumstances as to desirability of remaining and there was an authentic wish to remain a member that would certainly be a valid basis for revocation.

Question

Why could they not be a valid basis for revocation?

Answer

Because someone would have to check. There has to be a control mechanism.

Question from President

You said, someone has to check. In your pleading you say it is more than reasonable to have the unanimous refusal by the Council and we have to make some constitutional construction for the withdrawal procedure. But if the process is only to check against abuses, why is it not sufficient for the Council to control abuses and only when it rejects, that is also a check? You should start from process that good faith is being presumed and respected so for the Council to find there has been a breach of good faith.

Why does it need a positive right for any MS to refuse? Why did the Institutions not find that a more than reasonable solution?

Answer

You are suggesting silence should be answer…

Question

… that is not what I said. What I said good faith on either side. You say it cannot be fully unilaterally because there might be such abuses and they cannot be stopped. Why is that control mechanism not sufficient?

We are in a moment of constitutional construction on an existential matter of EU law there is a textual vacuum which needs to be filled.

Answer

One has to take the A50 construction as a whole and realise the normal consequence of notification is exit after two years. We look at the provision and see the only possible analogy is unilateral extension.

Question

That is what you said in your pleading. Is there more?

Answer

No

Question from Judge

If I correctly understood what you said the Commission says the MS has the right of revocation but it cannot become effective unilaterally? It is a conditional right. Where does that come from is it Article 50 – is that the basis? Where does the right come from if not the Vienna Convention?

Answer

It comes from the spirt of the Treaty which does not seek to prevent a MS from remaining.

Question from Judge

So Commission is arguing in favour of an autonomous interpretation of right to revocation?

Answer

Autonomous in favour of EU law.

Question from President

Same question I asked to Commission to Council.

Answer

Our interpretation is that if nothing happens a MS leaves. Therefore you must imagine there has been some sort of revocation. Our view would be that on the next day we are dealing with a third country. But the withdrawal notification could be revoked. We might be in a very dangerous circumstances of conflicting interpretations.

Question from President

So there is no misunderstanding it is a matter of expressly doing. Are you positively approving the revocation which means a single MS has a veto power or are you just as expressly stating the Council has to formalise unanimously an objection which is a non acceptance of the revocation. That is what I am submitting to you.

Answer

The situation is this. If we had no answer I could tell you what my advice would be. The advice will be that after the term of the two years if there has been no decision to terminate the MS will be out on the day following the end of the two year period.

It takes unanimity in Council to take MS to stay. If you are thinking in terms of mechanism can be put together, I have two points. First any voting rule or modalities for the taking of decisions in a mechanism invented by case law must be in line with general rules of treaty for action by European Council – consensus unless otherwise required. Or there could be acceptance unless there is unanimity to refuse revocation?

Lord President – that is what I am saying

Answer

It might not be difficult for a withdrawing Member State to find one ally in this circumstances.

Question from Judge to Council

How far can we make an analogy with process of accession to EU where conditionality is possible. Here we don’t have formal conditionality but we have factor of conditionality where formal member state imposes a condition.

Reviewability. Assuming the Council adopts the decision, regardless of its effect, this decision will have legal effects, it could be reviewed, and this court could be competent to decide. What happens to two year deadline in the meantime.

Answer

Before Judgment of Court our decision would stand. But review would put us in a very unstable position which is why it would be wrong for the court to introduce it.

Imagine we are in a situation where a withdrawing MS indicates it wants to stay. My guess is that it would be hugely difficult for a representative to state to oppose that.

There would have to be a positive decision where a single member state could oppose it. It would be easy to find one MS to say a MS could oppose in good faith but huge pressure for allowing the MS to remain. For any MS to take particular responsibility for opposing would create huge political responsibilities.

Question

What would you say that anything we would decide would interfere with political process in UK?

Answer

I don’t think it is a negative influence to have an idea of how the CJEU would interpret the provision.

Question

Our answers create political consequences

Answer

If you say it creates political consequences. My answer also has consequences but if you say it is, it is the final word.

*I missed a question*

Question from Judge

Imagine that A50 doesn’t exist. What should be the legal framework which is applicable?

Answer

You have in the file elements concerning discussions about the pre Article 50 world. Some said in absence of specific provisions there was no moving away foreseen and it is a general principle of law of treaties you can pull away from them. Article 50 was put there in order to clarify the situation it shows process is as orderly as can be conceived. What happens in terms of withdrawal is a process that is not clear.

Question

So you say Article 50 is a lex specialis?

Answer

Yes, but it is in line with Vienna Convention.

Question from Judge for Council

You take A50 as legal basis of procedure in cases of revocation. That Article 50 does not apply I wonder whether a more appropriate is Article 15(4) which is simplified consensus.

Secondly you say there could be abuse. But I don’t see that abuse.

Answer

On first question there is clear there is a normal basis which is consensus. We thought analogy with A50(3) would be used in this respect. But if construction that Article 15(3) is analogous we don’t have a view against that.

Question from President

Would a positive decision be needed to approve or the normal position voiced against a revocation?

Answer

It makes a big difference. It would make sense.

On second question there have been many speakers and academics and personalities and on this occasion this is a good opportunity to reconsider the way the Union operates.

Question from Judge for Council

I will ask you the question in English. I heard your reply that you mention the Vienna Convention. Following that logic which is not crystal clear because you could argue that we have relationships between several MSs and EU institutions but in any event if I read A50 there are two stages which are clearly circumscribed. The first is the intention to withdraw and then a reference is made to subsequent procedure. And then in para 5 there is a specific reference to what happens if a State wants to come back in (article 49). But what happens if inention to withdraw is revoked and nothing is said about that. If we have derogated from first and third aspect where is there any derogation from Vienna Convention in relation to an intention to withdraw. I see nothing about that. Even if just a provision of EU law then my question is, how can one invent, make up, the lawfulness of revocation and find a procedure to follow up it would be a purely legislative procedure.

Answer

For me it is not properly speaking a derogation. It is clear under A50 that withdrawal is not a negotiating with other MS but with the Union. For me the reason why I don’t think we are inventing something which we are constructing is that in my view in the interpretation we gave the notification has the automatic effect that the law of the Unions applies to the MS in two years. The decision as taken is already full force from the date of the notification. That is why we consider the fact of authorising the continued stay of the Union as something that requires a positive decision.

Question

There has to be a lex generalis is. You have to look to where it is and if the lex specialis is absent you have to look for a solution in lex generalis

Answer

Those answers are laid down in the treaty.

Question from Judge for Council

I am prolonging questions already asked.

Assuming that we are somewhere inside A50 and not squarely within 50(4) I wonder if there is any guidance if Court comes to situation where we are trying to find something from the underlying logic of A50. Is there any guidance from Article 7 which sets the bar very high in protecting a MS which doesn’t want to leave but is violating its treaty obligations. There there is a system carefully built in with Council taking a decision by unanimity and qualified majority of the Council but all along given a strong protection by suspending voting rights. Is there something in the logic there to say there should be similar or better protection for MS who may regret for whatever loyal reason that they have given an A50 declaration?

The decision to accept revocation – is that for the Council or EU Council.

Answer

For us it is for EU Council. WE consider it is guidance which could be used to determine what is the decision making rule to authorise the member state to remain.

As regards analogies with A7 I think it is a completely difficult approach to a systemic threat to the values of the Union. But the process is A7 has different stages and allows following a procedural requirement that some measures are taken to affect procedural decision of MS which poses this type of threat.

My advice for what it is worth is we should keep the procedures very separate in this respect.

Question from Judge for Council

You said that the withdrawal is a negotiation between withdrawing MS and Union. But this is not the effect of withdrawal but condition of withdrawal. Is that right. You said if nothing happens after notification withdrawal is automatic. Is that so? If withdrawal is result of decision of withdrawing MS if so why should withdrawal of that MS need the agreement of the Union.

Answer

You are right – notification of withdrawing MS and it is not to be accepted that they are between Union and MS but we read the law as requiring revocation to be accepted by unanimity.

The logic of the legal procedure is that there is an automaticity and revocation is not foreseen but because Council can allow extension the same procedure may by analogy apply to revocation.

Question from Judge for Council

I come back to question of abuse – the fear of abuse by a notifying state is what lies pretty much at the root of the idea that MSs should actively give their consent. Having indicated an intention to stay we are not now convinced you intend to accept the status quo ante. Am I correct? One is searching for a hedge against the protection.

Where I am leading is this. Isn’t it more logical to proceed on principle on analogy with Article 68 we are dealing with a sovereign state making a decision. A final decision has not been made in the UK – that is quite clear. Where I am leading is this. Should we look to see whether there is good faith or not at withdrawal of notification or just relying on the question of state sovereignty. But then if an application is re-presented you can ask the question of abuse when the application is represented.

Answer

There is no such thing as an abusive notification of an intention to withdraw. When the word intention is used it means a decision which is not immediately imposed – not just an idea. There is no control of abuse at this stage. I don’t think that the ensuing discussion as amounting to a pure conception of abuse. It is about minimising the disturbing effects of the separation.

It is not the need to protect the Union against abuse but to protect the Union against attempts to protect the Union against demands which have nothing to do with the notification.

Question

You say unanimity is required. I think you wish to ensure that MSs want to be satisfied that the right to revoke is being abused. But putting unanimity as a condition if rooted in abuse raises the question whether that is the right point at which to question why the MS is acting.

Answer

I see that point. Article 50(3) is an obvious analogy. That is our sole basis.

Question from Judge

I would be interested in knowing what Council and Commission think. It may make a difference whether there is a withdrawal of agreement or decision not to approve decision in Parliament. Debate in Parl seems to be going along the lines of leave or Remain. Because it has been said that this is the only deal that exists.

Response from Judge President.

This is a more contextual consideration to be taken up in the final replies.

Reply from Petitioners

I want to take up points made in discussions.

First, picking up what Judge Rodin said it might be better for it to make no decision because to do that would be to interfere. But the fact is that the Court is now vested with this question. If it refuses that is a decision which will also have political ramifications. It is not possible to avoid them.

The task this court has been vested with by this reference is interpreting a constitution. It is appropriate for it to look at the more general law of treaties in terms of the Vienna Convention and its adoption into general international law. We don’t say A65 has any application but simply on the basis of the silence of the lex specialis in A50 to make express revocation then the general principle as spoken to in A68 can be usefully prayed in aid.

Turn to points in relation to the issue of the UK government. We note it started with submissions because it is hypothetical because policy of UK Government is that there will be no revocation. But those points were made and rejected by the referring court. The decision on withdrawal is a matter for the UK Parliament.

An answer given after the meaningful vote will not be hypothetical.

**Reply by Additional Parties**

On the question of admissibility, there has been a decision of the Highest Court in Scotland. Three carefully reasoned decisions and the SC has decided the matter was exclusively for the Scottish Court. Applying the Court’s established case this question of judicial diversity and respect for different traditions is relevant.

On Parliamentary process, my clients are two members of Parliament. It is important to emphasis the vote that will take place on 10 or 11 is the beginning of a process. There will still need to be an Act of Parliament and then ratification of treaties under the normal constitutional process.

The critical point is about one MS holding the Union hostage. A single MS can withhold consent in all sorts of instances. All of these involve financial and other costs to the Union but that is in the nature of institutional decision making. On the question of abuse it seemed to me that the questions expose the absurdity of the Commission and Council’s position. The institution with responsibility for checking whether there is abuse is this Court. One falls back on the established principles on rule of law. There is something useful to be drawn from A7; there is no power to expel a MS. The Union must use its powers to bring the MS back into the Union.

The truth is that this idea that a MS might abuse the process by giving a conditional or tentative notice is three steps forward and three steps back is not a realistic process. There is a need for investment in a common future – this is what we are talking about when we talk about a valid revocation made in accordance with a valid constitutional decision to revoke showing respect and sincerity.

The only question is, is it abusive.

Looking at what has happened, no sensible MS would use A50. Look at the consequences for the UK of triggering A50. The collateral damage is a significant deterrent against revoking A50.

Finally, a point was made by Commission that this was all the UK’s own fault. The trouble with that is it treats a MS as a monolithic actor on the international law stage. And that is inconsistent with the approach that the Treaties take to citizens. A treaty is just a piece of paper but the law is about values and that is why we say the approach is about Van Gent. To the extent there is a vacuum you should look to democracy, citizens’ rights. Those are the principles you should approach

**Reply by Government**

UK Government reflects will of UK Parliament as contained in the notification statute.

You referred to what was described as a vacuum to be filled. That vacuum can only be filled at the appropriate time in accordance with the Treaties and the case law of the court and the jurisdictional boundaries of the court. I would urge that that is not appropriate. What are we to do where the Court is invited to cross that boundaries and the withdrawal agreement is submitted to the Court. That is why the jurisdictional boundaries of the Court have to be respected.

Finally come back to separation of powers and Parliamentary privilege. If it enters the debate prematurely it risks the accusation it is influencing the Parliamentary debate. That is why it is important the Court observes those jurisdiction boundaries. No matter how important the issue we must observe the boundaries governing the respect for the rule of law.

If or when the UK sought revocation and if it was objected to and a question might arise as to the interpretation and application of A50. That would involve a direct action by a MS falling within the boundaries of this court. But what we have here is a domestic action which seeks to engage the jurisdiction of this court at a point when domestic debate is purely engaged. “I invite this court to show respect for the UK Parliament.”

**Reply by Council**

We have reached the text of the Withdrawal Agreement and it respects rules and principles.

The only authority that has the possibility to address the institutions of the EU it is the government of the UK. But what happens in Parliament we are not going to comment upon.

**Reply by Commission**

In spite of mockery from Mr Facenna it is our role to put everything before the Court. One of the criteria for the Court is that its jurisdiction needs to be compulsory about the question asked of the Court.

In reply to Mr Facenna he makes much of the idea a MS cannot be expelled. But we have to recall that A50 has a certain internal inexorable logic. The notification starts a process which is automatic. Without an intervening event it leaves inevitably to the exit of the MS. And it would be exceptional for that not to occur. The President seems to envisage unanimity in reverse. That means a single MS could block it. Mr Facenna says the Council should have no role but it should be left to the Court. Can you imagine the state of uncertainty we would then be left in? I could not recommend this an approach.

Finally I have not been able to discern any difference between Council and Commission save for our decisions on revocability.

I will deliver my Opinion on a date I will announce on a later date. The Opinion and the Judgment will come quickly.