

CASE C-621/18

IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

REQUEST FOR A PRELIMINARY RULING

FROM THE COURT OF SESSION, SCOTLAND:

ANDY WIGHTMAN MSP and others

Petitioners

and

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Respondent

WRITTEN OBSERVATIONS OF THE PETITIONERS

The Petitioners are represented by Elaine Motion, solicitor of Balfour+Manson LLP, 56-66 Frederick Street, Edinburgh, EH2 1LS, instructing as counsel:

- (1) Aidan O'Neill QC (Scotland), QC (England & Wales) of Matrix Chambers, Griffin Building, Gray's Inn, London WC1R 5LN, who is called to the Bar in Scotland and to the Bar of England and Wales;
- (2) Maya Lester QC of Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD who is called to the Bar in England and Wales and to the Bar of Ireland; and
- (3) David Welsh of Axiom Advocates, Advocates Library, Parliament House, Edinburgh EH1 1RF who is who is called to the Bar in Scotland.

The Petitioners are also assisted by Professor Piet Eeckhout of the UCL European Institute, University College London, Gower Street, London WC1E 6BT.

Service of documents may be made by e-curia or by email at elaine.motion@balfour-mansion.co.uk

Date: 30 October 2018

INTRODUCTION AND SUMMARY

1. In “Meditation XVII” in his *Devotions upon Emergent Occasions* of 1624 CE, the English poet and cleric John Donne wrote that

“No man is an island entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less”.
2. The Scottish Court of Session has requested that this Court rule on whether EU law allows for a Member State to revoke its notification, once made under Article 50(2) of the Treaty on European Union (TEU), of its intention to withdraw from the European Union (EU). The Petitioners’ position is EU law does *not* preclude a Member State, during any negotiation period while the Treaties continue to apply to it, from revoking in accordance with that State’s constitutional requirements any such Article 50(2) TEU notification. The Petitioners submit that it is of central importance to the European Union, and to its peoples, and to its citizens, that this is so.
3. There is nothing in the Treaties that allows for a Member State to be forced out of its membership, or expelled from the Union against its will. But that would be the effect of a reading of EU law which held that an Article 50(2) TEU notification by a State of its intention to withdraw is, once made, irrevocable. This would not allow for any accommodation for a Member State’s intention changing during the notice period provided in Article 50(3) TEU, and for a decision to be taken by it, in accordance with that State’s constitutional requirements and before the Treaties cease to apply to it, to stay in the EU
4. An interpretation of EU law that would mean that, in such a situation, the Member State has nonetheless to withdraw from the Union and then ask to re-join it, would run counter to the spirit, wording, purpose and intent of Article 50 TEU. It would be incompatible with the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights upon which the EU is founded: Article 2 TEU. It would fail to respect essential State functions: Article 4(2) TEU. It would be contrary to the principles of sincere cooperation and of full mutual respect between the Union and the Member States: Article 4(3) TEU. And it would jeopardise the attainment of the Union’s objective of “creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”: Article 4(3) TEU and Recital to its Preamble.

CONTEXT

5. In December 2017 the Petitioners applied for judicial review before the Court of Session in Scotland. They sought a declarator on the question of whether a Member State had the right to revoke a notification, once made by it under Article 50(2) TEU, of its intention to withdraw from the Union. Different views have been expressed on this issue by European politicians,¹ EU institutions,² and by academics from across the EU³ as to whether or not a Member State's Article 50(2) notification is revocable,⁴ and, if so, is revocable unilaterally by the withdrawing State.⁵ Under Scots law, a declarator is a remedy whereby a right or a legal status can be judicially ascertained and declared. Since the question raised before the national court was one of EU law, the Petitioners asked the Scottish court to make a reference to this Court under Article 267 TFEU. This Court's answer is necessary to allow the Scottish court to pronounce an appropriate declarator under national law.

¹ See I Papageorgiou *The (Ir-)revocability of the Withdrawal Notification under Article 50 TEU* European Parliament Policy Department for Citizens' Rights and Constitutional Affairs (March 2018) at page 8 footnotes 3 and 4

² See e.g. Recital L of European Parliament Resolution (2017/2593(RSP)) of 5 April 2017 "...a revocation of [the Article 50] notification needs to be subject to conditions set by all EU-27, so that it cannot be used as a procedural device or abused in an attempt to improve on the current terms of the UK's membership"

The European Commission made the following claim in a press release On 12 July 2017

'It was the decision of the UK to trigger Article 50. But once triggered, it cannot be unilaterally reversed. Article 50 does not provide for the unilateral withdrawal of the notification'

³ Case C-327/18 PPU Minister for Justice and Equality v RO ECLI:EU:C:2018:644 (A-G Szpunar Opinion 7 August 2018) at footnote 35, citing in particular: A Łazowski "Be Careful What You Wish for: Procedural Parameters of EU Withdrawal", in C. Closa (ed.), *Secession from a Member State and Withdrawal from the European Union*, Cambridge University Press, Cambridge, 2017, pp. 234-256, at p. 241, and P Eeckhout and E. Frantziou "Brexit and Article 50 TEU: a constitutionalist reading" (2017) 54 *Common Market Law Review* 695.

⁴ For academic views denying the revocability of the Article 50(2) TEU notification see, among others: Patrick Ostendorf, "The withdrawal cannot be withdrawn: the irrevocability of a withdrawal notification under art.50(2) TEU" (2017) 42 *European Law Review* 451- 73; Ioannis Papegeorgiou, *The (ir-)revocability of the withdrawal notification under Article 50 TEU* Policy Department for Citizens' Rights and Constitutional Affairs (March 2018); Stefan Enchelmaier, "Exit from Brexit: would quitter's remorse count under Article 50 TEU ?" (2018) 33 *Butterworths Journal of International Banking and Financial Law* 278-281; and Paul Eden, "The revocability of instruments of withdrawal from multilateral treaties with particular emphasis on the United Kingdom's Article 50 TEU notifications" (SSRN Version – updated on 5 October 2018)

⁵ See among other jurists arguing for the unilateral revocability of the Article 50(2) notification: P. Craig, "Brexit: A Drama in Six Acts" (2016) 41 *European Law Review* 447, 463–464.; T. Tridimas, "Article 50: An Endgame without an End?" (2016) 27 *King's Law Journal* 297, 303; P. Eeckhout and E. Frantziou, "Brexit and Article 50 TEU: A Constitutionalist Reading" (2017) 54 *Common Market Law Review* 695, 714; A. Sari, "Reversing a Withdrawal Notification under Article 50 TEU: Can the Member States Change their Mind?" (2017) 42 *European Law Review* 451, 472 and Jens Dammann, "Revoking Brexit: Can Member States Rescind Their Declaration of Withdrawal from the European Union ?" (2017) 23 *Columbia Journal of European Law* 265, 287-300.

6. In *R (Miller) v Secretary of State* [2016] EWHC 2768 (Admin), [2017] UKSC 5 the position taken by the UK Government (what Lord Carnwath described at §261 as the “possibly controversial assumption”) was that “a notice under article 50(2) TEU cannot be withdrawn”: Divisional Court judgment at §10, UKSC majority judgment at §26. In the present case the Petitioners submitted before the referring court that this was incorrect (see §§ 40-51 of the Petitioners’ pleadings), but the UK Government has not disavowed their position. Instead, the UK Government entered the process before the national court as a Respondent, and opposed the Petitioners’ judicial review, and their request for a reference. In September 2018 the Inner House of the Court of Session rejected the UK Government’s objections and granted the Petitioners’ request. In upholding the competence of the Petitioners’ application for judicial review and granting the reference to this Court the Lord President, Lord Carloway, ruled (at §§ 27-8, emphasis added) that:

“27. It is clear, in terms of the European Union (Withdrawal) Act 2018, that MPs will be required to vote on whether to ratify any agreement between the UK Government and the EU Council. If no other proposal is proffered, a vote against ratification will result in the UK’s departure from the EU on 29 March 2019; a date which is looming up. *It seems neither academic nor premature to ask whether it is legally competent to revoke the notification and thus to remain in the EU. The matter is uncertain in that it is the subject of a dispute; as this litigation perhaps demonstrates. The answer will have the effect of clarifying the options open to MPs in the lead up to what is now an inevitable vote.* Whatever the interest of MSPs and MEPs, MPs have an interest in seeing the matter resolved. On that basis the petition is competent at least at the instance of an MP.”

7. The Court of Session correctly rejected the Respondent’s argument that - because the UK Government’s current publicly expressed policy is that the notification *will* not be revoked - the issue of whether and how it *could be* revoked was hypothetical and/or academic. This is because the petition was brought by, among others, six elected members representing Scottish constituencies in three legislatures: the Scottish Parliament, the European Parliament and the UK Parliament. They will each be required, before 29 March 2019, to vote on whatever withdrawal deal results from the negotiations triggered by the UK’s notification. Whether or not the UK may revoke its Article 50(2) TEU notification is highly material to the decisions facing these Petitioners as to how to carry out their democratic duties. For, as the President of this Court in his 19 October 2018 order granting expedition,
- “the implementation of Article 50 is of fundamental importance for the United Kingdom and for the constitutional order of the European Union.”

8. Section 28(8) of the Scotland Act 1998 recognises “that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent

of the Scottish Parliament”. This Legislative Consent Convention applies to provisions, necessarily consequent on the UK’s withdrawal from the EU, which would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers. The first and second Petitioner are Members of the Scottish Parliament who will vote on this legislative consent motion relative to any withdrawal deal.

9. Any withdrawal agreement must be submitted to the European Parliament for its consent. Only when, and if, the consent of the European Parliament has been obtained, can the terms of this agreement be formally concluded on behalf of the EU: Article 50(2) TEU. The third, fourth and fifth Petitioners are Members of the European Parliament representing the Scotland constituency. In voting on this matter, they will require to consider whether revocation of the notification of intention to withdraw would be the better option for their constituents than approving the withdrawal deal as negotiated. They need to know whether such revocation is, as a matter of EU law, open to the UK to allow them to cast their votes in a properly informed way.
10. Section 9(1) of the European Union (Withdrawal) Act 2018 requires that, before exit day, a statute be enacted by the UK Parliament “approving the final terms of withdrawal of the UK from the EU”. Section 13 of this Act separately provides that, prior to ratification or implementation of any withdrawal deal, the UK Parliament must vote on whether to approve the terms of any proposed withdrawal agreement. So far as practicable, a Minister of the Crown must make arrangements for the motion before the House of Commons to be debated and voted on *before* the European Parliament decides whether it consents to the withdrawal agreement: Section 13(2). The seventh petitioner is a Member of the UK Parliament from a constituency in Scotland. She will vote on these matters when they come before the UK Parliament.

THE PETITIONERS’ OBSERVATIONS ON THE QUESTION REFERRED

11. Article 50 TEU does not expressly address what happens when a Member State wishes to revoke a notification of its intention to withdraw from the Union during the negotiation period. Certainly nothing in that provision (or elsewhere in the Treaties) states that notice of an intention to withdraw cannot be revoked. The wording, context and objectives of Article 50 must all be taken into account.⁶ This Court will, in so far as possible, interpret

⁶ Case C-640/15 *Vilkas* EU:C:2017:39 at §30

the Treaties with a view to filling any lacunae whose persistence would lead to a result contrary to the spirit of the Treaties and to the system of EU law.⁷

12. The Petitioners consider that the following matters make it clear that, properly interpreted, nothing in the Treaties or in the system of EU law precludes the revocation of its Article 50(2) TEU notification by a Member State which decides, in good faith and in accordance with its constitutional arrangements, during the period of negotiation before the Treaties cease to apply to it, that its intention has changed and that it no longer intends to withdraw from the Union.
13. **First**, withdrawal from the Union, like membership of the Union, is a voluntary act on the part of each Member State, initiated by a Member State. The purpose of Article 50 TEU is to set a *procedure* for that process of voluntary withdrawal. The voluntary nature of Union membership and of withdrawal, strongly suggests that if a Member State changes its intention before the Treaties cease to apply to it, it should be possible for it to do so. In such circumstances, it should not be made to leave the Union and be required to apply to re-join it. Any other interpretation would jeopardise the Treaty on European Union's objectives of continuing the process of creating "an ever closer union among the peoples of Europe" and of deepening "the solidarity between their peoples while respecting their history, their culture and their traditions".
14. Article 50 TEU confirms the existing international law position that Member States are entitled to leave the EU. The unilateral character of the right to leave the EU is a manifestation of State sovereignty of the withdrawing Member State. The German *Bundesverfassungsgericht* confirmed In re Ratification of the Treaty of Lisbon [2010] 3 CMLR 13, at §329 that

"The treaty makes explicit for the first time in primary law the existing right of each Member State to withdraw from the European Union (Article 50 Lisbon TEU). *The right to withdraw underlines the Member States' sovereignty...*"

The Court of Appeal of England and Wales adopted this analysis in Shindler v Chancellor of the Duchy of Lancaster [2016] EWCA Civ 469 [2017] QB 226 at §14:

"a decision by a Member State to withdraw from the EU is an exercise of national sovereignty of a special kind for which the TEU has made the express provision *that this may be done in accordance with a Member State's own constitutional requirements.*"

⁷ Case 294/83 "*Les Verts*" v *Parliament* [1986] ECR 1357 at §25.

15. Since the legal effect of the withdrawal notification derives from the sovereign will of the withdrawing Member State - and may be said to be the exercise of an “essential State function” which Article 4(2) TEU binds the Union to respect - it is equally consistent with the provisions of Article 50 TEU for the Member State concerned unilaterally and in good faith to choose to withdraw its Article 50(2) TEU notification, and thereby bring the unilateral withdrawal process to an end before the Treaties cease to apply to it. Given that the Treaties accept that a Member State may withdraw from the process of ever closer union by way of a unilateral act, by the same token EU law does not preclude the Member State similarly to exercise its sovereignty by, in good faith, unilaterally retracting its notice of intention to withdraw before the notice period specified in the Treaty comes to an end.
16. **Second**, the notification by a Member State of its intention to withdraw under the procedure provided for in Article 50 TEU is a first step, followed by a negotiation phase, before withdrawal becomes definitive. Notification of intention is not itself definitive. Article 50 TEU uses the word “intention” and uses the present tense (“which decides”). An intention is not a binding commitment; it can be changed or withdrawn. This strongly suggests that Article 50 TEU should be interpreted so that notification does not have to lead inexorably to withdrawal from the EU if a Member State changes its mind and no longer intends to withdraw. As Jean-Claude Piris, former Director General of the Council’s Legal Service, put it (*Financial Times*, 1 September 2016), “there is no legal obstacle to the UK changing its mind, in accordance with its constitutional requirements”.
17. **Third**, for many Member States withdrawal from the Union would require an amendment to their (written) constitution. If a Member State subsequently decides to remain in the Union then this may require further constitutional amendment to ensure that the decision complies with the State’s constitutional requirements. This means that a decision to withdraw an Article 50(2) TEU notification will not be made readily or lightly but only after a genuine change of heart in the Member State on the wisdom of withdrawal. Notification under Article 50 TEU must therefore be revocable by a Member State if its domestic constitutional requirements for withdrawal from the EU are *not* met.
18. Where, as in the UK, the decision as to whether to withdraw from the EU rests in the hands of the Member State’s democratically elected and accountable legislatures, EU law should not be read as preventing those legislatures from exercising their constitutional right and function, if so advised, to vote for the revocation of the Article 50(2) TEU notification to

maintain their State's membership of the Union. That is fundamental to the exercise of national sovereignty, and it is particularly crucial from the perspective of those Petitioners who are elected parliamentarians. As has been noted:

“The transfer of powers from the Member States to the EU must not adversely affect national democracies. On the contrary, the EU decision-making process must be accommodated so as to create ‘more democracy’, be that at national or at EU level”.⁸

Article 50 TEU ensures the EU's commitment to democracy and the rule of law, and to respect for the political and constitutional structures of Member States as well as the principle of subsidiarity. These fundamental values are enshrined in, among other provisions, Articles 2, 4, 5, 9, 10 TEU, and in Protocol No. 1 to the EU Treaties on the role of national parliaments in the EU.

19. **Fourth**, given the serious impact on individuals' rights that withdrawal from the EU entails, only the very clearest of words in Article 50 TEU could result in a meaning that would *prevent* a decision by a Member State to remain in the Union from being given effect in EU law.⁹ EU law creates directly effective rights and duties that are fundamental to the lives of millions of people across the Union. Those rights have “become part of their legal heritage”.¹⁰ If the UK ceases to be a member of the EU, UK nationals will necessarily lose their status of being EU citizens and will no longer be able to claim the protections of EU law. This will have a particularly negative impact on those UK national “free-movers” who have left the UK and have established themselves elsewhere in the EU in exercise of their EU citizenship rights. Post exit from the EU, EU migrant workers and their families in the UK will not be able to rely on their rights of (EU) citizenship vis-à-vis the UK authorities.¹¹ Their status will revert to the common law category of “alien *ami*”, now living in the UK under sufferance rather than as of (EU law) right: R (Bancoult) v Foreign Secretary (No 2) [2008] UKHL 61 per Lord Mance §152. And, since EU law will no longer have primacy within the UK's legal order in the face of its constitutional doctrine of Parliamentary sovereignty, there will be a fundamental diminution in the level of protection available to formerly EU law

⁸ Koen Lenaerts “The Principle of Democracy in the Case Law of the CJEU” (2013) 62 ICLQ pp 271–315 at 312

⁹ It is well established that the Court will avoid an interpretation that is capable of prejudicing fundamental rights: Case 29/69 Stauder v Ulm [1969] ECR 419 at 425 at §7.

¹⁰ Case 26/62 van Gend & Loos EU:C:1963:1 [1963] ECR 3 at page 12

¹¹ Opinion of Advocate General Jacobs in Case C-168/91 Kotsantinidis EU:C:1992:504 46 at §46.

derived rights both within and against the UK, and whether claimed by UK nationals or by nationals of the other Member States.¹²

20. There would have to be express wording for an interpretation of EU law that results in forced withdrawal in circumstances where there has been a change of mind and a decision by the Member State in accordance with its constitutional requirement to remain in the Union. Yet there is not even implied wording in the Treaties to this effect. The preamble to the EU Charter of Fundamental Rights states that the EU legal and political order: is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; is based on the principles of democracy and the rule of law, and places the individual at the heart of its activities. An interpretation of Article 50 TEU which allows for a Member State unilaterally to revoke its earlier notification of its intention to withdraw from the EU is therefore to be preferred, because it makes better provision for the preservation and continued protection of the acquired EU law rights of every citizen of the EU.

21. **Fifth**, in the present case if no withdrawal agreement has come into force by 29 March 2019, Article 50(3) TEU provides the Treaties shall simply cease to apply to the UK (unless the European Council, in agreement with the UK, unanimously decides to extend this 2 year period from the date of initial notification). And yet if, during the Article 50(3) TEU notification period, the Member State decides that it wishes to remain in the EU and not to end its membership, nothing in the Treaties says that State should nonetheless be forced out and in effect expelled from the EU against its will. But that would be the effect of a reading of Article 50 TEU that did not permit a notification to be revoked at the instance of the withdrawing State. Article 50 TEU was never intended to be a mechanism for the expulsion of a Member State against its will. Nothing in Article 50 TEU (or the other Treaty provisions) suggests that it should be interpreted as if it were or had that effect. Indeed the debates in the Convention on the Future of Europe where Article 50 TEU was drafted and discussed show that a power to expel a Member State in these circumstances was considered and *rejected*, as were other provisions making the process of withdrawal more onerous.¹³ The EU seeks integration, not disintegration. It would be wholly inconsistent with the EU's fundamental principles and aims for Article 50 TEU to be interpreted as meaning that

¹² This was common ground in *R (Miller) v Secretary of State* [2017] UKSC 5 at §69.

¹³ List of proposed amendments to the text of the Articles of the Treaty Establishing a Constitution for Europe, 'Part I of the Constitution: Article 59'

a Member State must leave the EU against its wishes in circumstances in which, in good faith, and in accordance with its constitutional requirements, it reconsiders its intention to withdraw. Expulsion is contrary to the principles of good faith, loyal cooperation and the EU's commitment to respect Member States' constitutional identities.

22. **Sixth**, Article 50(5) TEU states that, if a Member State withdraws but wishes thereafter to re-join the EU, it would have to apply to re-join *de novo*. That provision and requirement applies only once the Treaties cease to apply to the withdrawing Member State. Prior to the date of withdrawal, however, if the withdrawing Member State wishes to remain in the EU, a reading of Article 50 TEU to the effect that a Member State which in good faith and in accordance with its own constitutional requirements has changed its mind on the issue of withdrawal should nonetheless be required to leave and then apply for membership anew would not be "in accordance with law". This would constitute a disproportionate and unnecessary interference in the acquired and fundamental rights protected under the EU legal order of, among others, those individuals who are EU citizens by virtue of, and only of, their UK nationality as well as those other EU citizens who have relied on their rights as EU citizens to move to and settle and establish themselves in the UK.

23. If such good faith unilateral revocation of the Article 50(2) TEU notice were *not* legally possible or effective - even in a situation where a decision had been taken by the withdrawing State in accordance with its constitutional requirements to revoke and withdraw the notice of its intention to leave the EU - this would undermine the fundamental constitutional principles that underpin the EU: fundamental rights, solidarity, democracy, respect for the constitutions of individual Member States, subsidiarity, proportionality, the rule of law and respect for the principles of international law: see, among other provisions, Articles 2, 5, 21 TEU. Lord Kerr of Kinlochard - who had a principal role in the drafting of Article 50 TEU as the UK Permanent Representative to the EU - has repeatedly and publicly stated, the intention of the drafters of Article 50 TEU was rather to continue to allow for Member States, who have given notice of their intention to leave the EU, timeously to withdraw that notice. As he said in his oral evidence to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee on 5 October 2017:

"There would have been a sixth sub-clause if I had not been assured that there was no need to include one. If it does not say that you cannot withdraw your letter, you can withdraw it—that was the legal advice that I had, and I am sure that it is right... There

is legal dispute—you are quite right. There are some who say that sending an article 50 letter is an irrevocable act. They are, I assure you, wrong.”

24. **Seventh**, support for the petitioners’ position can be drawn from the relevant *travaux préparatoires*¹⁴ of the European Convention on the Draft Treaty Establishing a Constitution for Europe¹⁵ where it is stated expressly that what is now Article 50 TEU was based in part on provisions of the Vienna Convention on the Law of Treaties (VCLT).¹⁶ The principles set out in Articles 67 and 68 VCLT are plainly therefore relevant to the interpretation of Article 50 TEU. The international law of treaties recognises the importance of recognising that States may change their mind on withdrawing from treaties, before the withdrawal has taken effect.¹⁷ Article 67(2) VCLT provides, so far as relevant, that “any act ... withdrawing from ... a treaty pursuant to the provisions of the treaty ... shall be carried out through an instrument communicated to the other Parties”. Article 68 VCLT provides that “a notification or instrument provided for in article ... 67 may be revoked at any time before it takes effect”. The International Law Commission which adopted Article 68 VCLT underlined the importance of the principle of revocability:

“the considerations militating in favour of encouraging the revocation of notices and instruments of denunciation, termination etc. are so strong that the general rule should admit a general freedom to do so prior to the taking effect of the notice or instrument. The Commission also felt that the right to revoke the notice is really implicit in the fact that it is not to become effective until a certain date”.¹⁸

¹⁴ See K. Lenaerts and J. Gutiérrez-Fons, “To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice”, EUI Working Paper AEL 2013/9 (2013) at pages 19-24 for a survey of the CJEU’s use of *travaux préparatoires*.

¹⁵ In *Case C-370/12 Pringle* ECLI:EU:C:2012:756 (Full Court, 27 November 2012), this Court expressly relied on the *travaux préparatoires* relating to the Treaty of Maastricht when determining the aim pursued by the “no bail-out clause” enshrined in Article 125 TFEU namely to maintain the financial stability of the Monetary Union by ensuring that the Member States follow a sound budgetary policy. In the same way, in *Case C-583/11 P Inuit Tapiriit* ECLI:EU:C:2013:625 (Grand Chamber, 3 October 2013) this court examined the drafting history of the fourth paragraph of Article 263 TFEU, referring (at §57) to a cover note of the Praesidium of the European Convention.

¹⁶ *Document du Praesidium: projet concernant l’appartenance à l’Union européenne* of 2 April 2003 prepared by the European Convention for Article I-59 of the Draft Treaty Establishing a Constitution for Europe,

“l’article 46 relatif au retrait volontaire d’un État membre de l’Union est une disposition nouvelle. Elle reconnaît expressément la possibilité pour chaque État membre de se retirer de l’Union européenne s’ils en décide ainsi. La procédure de retrait s’inspire en partie de celle prévue dans la Convention de Vienne sur le droit des traités, tout en prévoyant la possibilité pour l’Union et l’État membre concerné de conclure un accord régissant les modalités de son retrait et établissant le cadre de leurs relations futures.”

¹⁷ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at page 66 §109.

¹⁸ ILC, “Draft Articles on the Law of Treaties with commentaries”, *Yearbook of the International Law Commission*, 1966, vol II p.264. Emphasis added.

25. Article 68 VCLT is “a safeguard for the stability of treaties”; it is part of the basic principle *pacta sunt servanda*¹⁹ and may, indeed, embody a norm of customary international law.²⁰ Whether it does or not,²¹ there are even more powerful reasons why this principle should apply to Article 50 TEU, given the withdrawal of rights involved in withdrawing from the EU Treaty, and the importance Article 50 TEU places on voluntary withdrawal by a sovereign Member State in accordance with its constitutional arrangements. Article 50(3) TEU makes clear that Treaties continue to apply to a withdrawing State until the date of entry into force of the withdrawal agreement or, failing that, two years after the Article 50(2) TEU notification. The principle embodied in Article 68 VCLT strongly suggests that a Member State may therefore revoke its notification during that Article 50(3) TEU period.

CONDITIONS ON REVOCATION

26. That Article 50 TEU permits the revocation of an Article 50(2) TEU notification given by a Member State notice does *not* mean that a withdrawing Member State has *carte blanche* to revoke a notification for a purpose that is not a good faith intention for the Member State to remain in the EU. Article 50 TEU provides a procedure for withdrawal and must not be used, for example, as a means of negotiating more favourable conditions upon which a State might remain in the EU. The European Parliament was correct to say that a revocation should not be “used as a procedural device” or “abused in an attempt to improve on the current terms of the UK’s membership”.²²
27. Member States must act in good faith and in accordance with the principle of sincere cooperation, which obliges the EU and the Member States “to assist each other in carrying out tasks which flow from the Treaties”: Article 4(3) TEU. It is, in any event, a general principle of EU law of comprehensive application that EU law cannot be relied on for

¹⁹ (1963) I Yearbook of the ILC p.164 (legal.un.org/ilc/publications/yearbooks/english/ilc_1963_v1.pdf).

²⁰ See the ILC’s Commentary on its final draft Article 64 (which is identical to Article 68 VCLT) in ILC *Draft Articles on the Law of Treaties with commentaries 1966* reprinted in [1966] *Yearbook of the International Law Commission*, Vol II, 264. See, too, H. Krieger “Article 68” in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (Berlin/Heidelberg: Springer, 2012), p.1173 at p.1173.

²¹ In Case C-162/96 *A. Racke GmbH & Co v. Hauptzollamt Mainz* [1998] ECR I-3655 this Court confirmed (at §§ 45, 50) that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order, but held that the specific procedural requirements laid down by Article 65 of the Vienna Convention did not form part of customary international law. No reliance is made upon these provisions of Article 65 VCLT. However a Member State’s Article 50(2) TEU notification of its intention to withdraw from the Union made be said to an example of an act falling within the broader terms of Article 67(2) VCLT: see A. Tzanakopoulos, “Article 67 Convention of 1969” in O. Corten and P. Klein (eds.) *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: Oxford University Press, 2011) at §22.

²² Recital L of European Parliament Resolution (2017/2593(RSP)) of 5 April 2017.

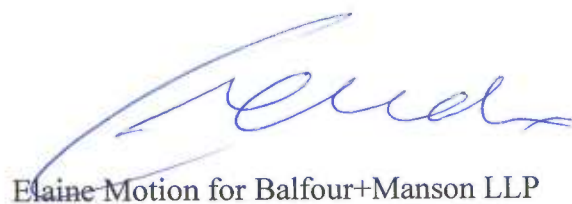
abusive ends: Case *C-251/16 Cussens v. TG Brosnan* ECLI:EU:C:2017:881 at §§27-32. Accordingly, a State could not use the possibility of revocation in bad faith, as a way of imposing costs on other Member States or trying to improve its conditions of membership.

28. Given that these principles are a fundamental aspect of EU law, the Petitioners do not consider it appropriate or necessary for the Court in this case to set down further conditions for a revocation of notification under Article 50 TEU. The duty of sincere cooperation and doctrine of abuse of right provide adequate safeguards. There will be an abuse of right where, despite formal observance of the conditions laid down by the EU legal rules, the purpose of those rules has not been achieved, and where there is evidence that the party involved has improperly intended to obtain an advantage from the EU legal rules by relying upon them solely with a view to the artificial creation of the conditions laid down for obtaining the benefit.²³
29. There may be future cases in which the Court will adjudicate, raising issues as to whether a particular revocation of a notification is an abuse, or a breach of the duty of sincere cooperation. But there is no question of abuse in this case. Those are truly hypothetical situations. If the United Kingdom were to withdraw its notification in the present circumstances, in accordance with its constitutional principles (for example by an Act of Parliament following an advisory referendum), it would be doing so from a genuine and constitutionally expressed desire to remain in the EU. There is no suggestion that the UK would be intending to obtain an improper advantage from Article 50 TEU by relying upon that provision solely with a view to the artificial creation of the conditions laid down for obtaining the benefit.

PROPOSED ANSWER TO QUESTION REFERRED

30. The Petitioners therefore suggest the following answer to the question referred: Where, in accordance with Article 50 TEU, a Member State has notified the European Council of its intention to withdraw from the European Union, Article 50 TEU permits that notice to be revoked by the notifying Member State within two years of the notification, provided that the notification is revoked in accordance with the Member State's national constitutional requirements.

²³ See generally Daniel Benrath, "Bona fides and revocation of withdrawal: how Article 50 TEU handles the potential abuse of a unilateral revocation of withdrawal" (2018) 43 *European Law Review* 234

A handwritten signature in blue ink, appearing to be 'Aidan O'Neill', is written over the text 'Elaine Motion for Balfour+Manson LLP'.

Elaine Motion for Balfour+Manson LLP

Aidan O'Neill QC

Maya Lester QC

David Welsh

Professor Piet Eeckhout

Date: 30 October 2018

LIST OF ANNEXES

[annex numbers, short description of document, reference in written observations]