



**BRIEFING PAPER**

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# Brexit: Article 50 TEU at the CJEU

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## Summary

The *Wightman* case concerns the UK's potential ability to revoke its notification of Article 50 of the Treaty on European Union (TEU). Following a dispute between the UK Government and several Scottish MSPs and MPs, the Scottish Inner House of the Court of Session referred a question to the Court of Justice of the European Union (CJEU) to ascertain if unilateral revocation of Article 50 TEU notification (to withdraw from the EU) was possible, with or without conditions.

On 4 December 2018, the CJEU's Advocate General's opinion set out that unilateral revocation was possible, but would be conditional on such a revocation being in line with domestic constitutional requirements, being made before a withdrawal agreement took effect or the two-year 'exit negotiation' period stated in Article 50 TEU had ended, and being made in 'good faith'.

On 10 December 2018, the CJEU itself ruled and, in contrast to the Advocate General, found that unilateral revocation of Article 50 TEU was a sovereign right for any Member State to pursue without any conditions attached, beyond the decision to revoke notification needing to follow a 'democratic process' that satisfied national constitutional requirements (as notifying under Article 50 TEU also does) and that the revocation would have to be made before a concluded withdrawal agreement had entered into force or (if there was no agreement) before the Article 50 negotiating period had expired (whether extended by unanimous European Council agreement or not). It further stressed that revocation would result in the Member State remaining an EU Member State on identical terms – meaning that for the UK, a decision to revoke Article 50 TEU would not result in the loss of the UK's various opt-outs or the budget 'rebate' negotiated by the Thatcher government.

# 1. Background to the Dispute

## History of the case to date

*Wightman* was brought by a cross-party group of MPs and MSPs in Scotland (from the Labour party, SNP, Liberal Democrats and Scottish Greens), backed by the [Good Law Project](#). Their original application for [judicial review](#) into whether the UK can unilaterally revoke Article 50 was granted by the Court of Session in Edinburgh in March 2018. The Court initially [decided](#) on 8 June not to refer the matter to the CJEU, given that it was a hypothetical question as the Government does not intend to withdraw the A50 notice.

However, following an appeal, the Inner House of the Court of Session ruled that the question should be referred to the CJEU, because it did not concern a purely hypothetical matter: since the UK Government held the view that it could not be revoked in, amongst other situations, the *Miller* case, there was a clear 'dispute' in the sense that the parties going to court believe that it could be. The UK Government [sought to appeal](#) against the ruling, but its request for an appeal was [rejected](#) by the Supreme Court on 20 November.

The question referred to the CJEU was this:

'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?'<sup>1</sup>

## Before the CJEU

The case was heard by the full court of judges at the CJEU on 27 November 2018. Lawyers for the petitioners (the cross-party group bringing the case) argued that requiring agreement of all Member States in order to withdraw an Article 50 notice would "ride roughshod" over EU principles, as it would mean a Member State could be forced out of the EU against its will if it changed its mind after invoking Article 50. The UK Government argued that the case should not be permissible as it was a hypothetical question (as it did not intend to revoke Article 50) and any ruling would be used to shape domestic political debate in the UK.

Both the European Commission and the Council of the EU also argued against unilateral revocability of Article 50. The Council said allowing unilateral revocability could lead to Member States continuing to invoke and revoke Article 50 in an attempt to win concessions from the EU (although termination of the Article 50 process should not be prevented if all Member States agree). The Commission also raised the possibility of the process being abused if Member States could invoke Article 50 and

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<sup>1</sup> AG Opinion in Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:978, para 27.

then revoke unilaterally. It argued that as the extension of Article 50 required unanimity in the European Council, so should revocation.

## 2. The Advocate General's Opinion

The Advocate General (AG) - a legal officer working for the CJEU who issues a non-binding impartial 'opinion' on the case before the judges rule on it, to assist them in their task - assigned to the case, AG Campos Sánchez-Bordona, issued his [opinion](#) on 4 December 2018. The opinion is set out significant detail below despite the fact that the CJEU itself has now issued a judgment (see Section 3 below), as the AG's opinion is significantly more detailed in its reasoning than the CJEU's judgment is, and the CJEU judgment cross-refers the AG's findings at points.

### Admissibility

The Advocate General (AG) first considered the admissibility of the case: as the UK Government argued that the question referred was inadmissible on two separate grounds, this was the first matter for the AG and the CJEU to consider. The UK Government contended both that the question referred was hypothetical, as there is no indication that the UK (or Parliament) intends to revoke Article 50; and that in answering the referred question, the CJEU would be overstepping the powers it was granted by the Treaties, as they do not envisage the CJEU providing opinions on "constitutional matters" like a Member State withdrawing from the EU (para 33).

Both UK arguments were rejected by the AG. Like the Inner House, the AG did not consider that a hypothetical question was at play in *Wightman*; his opinion noted that there was a genuine dispute at play with opposing arguments, as the applicant parties believed Article 50 TEU to be unilaterally revocable, and the UK Government believed it was not (para 38). In order to settle this dispute, the AG argued, an answer to the referred question was essential (para 39).

More than that, however, the 'dispute' at play was not a purely 'academic' one – constructed for the sake of answering a question without there being an actual dispute underpinning it. The AG noted that Article 50 is 'actually in the course of being applied and the future legal consequences of which are drawing inexorably closer' (para 40). He stressed the importance of the CJEU's answer in light of the 'enormous' repercussions for the EU, the UK, and citizens of both affected by Brexit (para 41). Finally, and perhaps slightly more controversially, the AG noted that an answer to the question referred to the CJEU was necessary *before* 29 March 2019, in order to 'enable MPs to know whether there is a third way available to them', beyond voting for the withdrawal agreement or 'no deal' (para 45).

The AG noted that the UK argued that this was the CJEU treading on 'politically sensitive' ground and interfering in decisions still being negotiated by various parts of the UK Government. He rebutted that the role of the CJEU in this instance was not one of *advising* the UK, and thus interfering with domestic UK politics, but rather 'of stating *what the law is*' (para 49-51). This was not going beyond the task set out for the CJEU

in the Treaties; and the AG stressed that ‘as in other cases of *special* sensitivity for the Member States, the Court cannot relinquish its obligations, evading answering a question that is correctly formulated ... solely on the ground that that answer may be read from a political, and not a strictly legal, perspective, by one or other party’ (paras 52-53).

The AG consequently concluded that the question referred was admissible for a CJEU preliminary ruling.

### **Substance: Can Article 50 be revoked unilaterally?**

The substance of the argument before the CJEU was set out very clearly by the AG in paragraphs 58 to 60:

58. May a Member State (in this case the United Kingdom) revoke the notification of the intention to withdraw from the European Union, once it has been communicated to the European Council?

59. As Article 50 TEU does not expressly answer such an apparently simple question, three solutions are possible: **(a) no, not in any case; (b) yes, unconditionally; or (c) yes, under certain conditions**. The reasoning to justify any of those answers is undoubtedly complex, as shown by the debate there has been in the Member States (especially in the United Kingdom) and in the legal literature. [\(32\)](#)

60. The issue has found its way to these preliminary ruling proceedings, in which:

- The applicants (Wightman and Others) and those intervening in support of them (Tom Brake and Chris Leslie) argue that unilateral revocation is feasible, subject to certain conditions.
- On the other hand, the Commission and the Council oppose unilateral revocation, but contend that Article 50 TEU allows a form of revocation (which I shall describe as *agreed*) approved unanimously by the Council.

In the remainder of the opinion, the AG proceeded to consider the merits of the options (a) and (b) – before then considering if any conditions are applied to revocation.

His first area of analysis to arrive at an answer to the question was general public international law, and what it has to say on how States can withdraw from international treaties (and, where applicable, revoking an application to withdraw). Following a detailed analysis, the AG concluded that there is no *customary* international law on revoking notification of withdrawals (para 75), but that the Vienna Convention on the Law of Treaties (VCLT), which sets out the general international law rules on how to interpret international agreements, perhaps contains useful insight into how revocation of withdrawal notifications *ordinarily* works in international law, given that Article 50 TEU is silent on the matter but was inspired by the VCLT provisions on Treaty withdrawal (para 85).

The key provision of the VCLT is Article 68, which states that ‘A notification or instrument provided for in Article 65 or 67 [which set out the VCLT processes for withdrawing from a Treaty] may be revoked at any time before it takes effect.’

The AG proceeded to analyse Article 50 TEU to consider if Article 68 of the VCLT can be read to apply to Article 50 TEU. Using literal and contextual interpretation, he first found that a decision to withdraw is clearly unilateral, per the wording of Article 50 TEU (para 91), and that that was 'conducive to the possibility' of unilaterally revoking a notification of that decision as well: 'unilateral revocation would also be a manifestation of the sovereignty of the departing Member State' (para 94). Surveying the remainder of the conditions attached to withdrawal in Article 50, the AG stressed that it requires the notification of an *intention* to withdraw, and that '*intentions* are not definitive and may change' (para 100). Finally, the AG stressed that a different condition of Article 50 TEU here has significant effects: as Member States can withdraw from the EU as long as they do so in line with their domestic constitutional requirements, this implies that a violation of domestic constitutional requirements could result in a notification of withdrawal needing to be annulled (para 104). A reference here can clearly be made to the *Miller* judgment: had the UK Government given notice without putting a bill before Parliament, this would have been in violation of the conditions set out in Article 50(2), and the Supreme Court's ruling in *Miller* should have resulted in the UK *withdrawing* its notice to withdraw. This, according to the AG, made it clear that unilateral revocation of withdrawal was at least in some contexts possible. The same would happen if the notice to withdraw was filed on a correct constitutional basis, but that basis was later overturned—by, for instance, a referendum or a 'meaningful vote' or an election—which would again require a Member State to withdraw its Article 50 TEU notice (para 105) *or* would, in the alternative, force a Member State *out* of the EU when it no longer wished to leave (para 111).

Following this analysis, the AG concluded that as there is no clash between what Article 68 VCLT and Article 50 TEU here permit or require in terms of revocation procedures, he found 'no reason not to apply, by analogy' the Article 68 VCLT unilateral revocation possibility to Article 50 TEU (para 108).

As such, 'the Member State which has activated Article 50 TEU in order to withdraw from the European Union may 'deactivate' it when its will changes, in accordance with its own constitutional requirements' (para 116).

Following this setting out of his own literal and contextual interpretation of Article 50 TEU, the AG tackled the opposing arguments set out by the Council and the Commission. Their view was that while the initial *notification* under Article 50 TEU is unilateral, the actual negotiations under Article 50 TEU are bilateral - and as such cannot be unilaterally ended. They argued for a unanimous decision by the European Council as being the only way to 'revoke' notice under Article 50 (para 119). The AG, however, disagreed with this interpretation, not least because the departing Member State does not actually *have* to engage in negotiations under Article 50 TEU: two years after notification, exit would be automatic, suggesting a unilateral process (para 122).

The other primary argument put forward by the Council was that notification starts a process that has legal effects even before a Member State formally withdraws. The AG agreed, and while he noted that costs incurred over the course of 'exit' negotiations might 'give rise to disputes', any new EU law produced on account of the negotiations with a departing Member State could not be described as an 'effect' of notification itself (para 125-126). The Council argued that it was unreasonable for the EU to bear the costs of any preparation for Brexit if the withdrawing state was unilaterally able to change its mind, but the AG did not consider this a reason to preclude unilateral notification, not least of all because the actual cost of withdrawal would significantly surpass the '(minimal) costs generated by the revocation' (para 127-128).

The AG considered alternative means of interpreting Article 50, but found that a teleological interpretation (rooted in the aims of the Treaties) similarly supported an ability for a Member State to 'change its mind', both on account of the Treaties' commitment to respecting national constitutional identities of the Member States, and more generally, as the purpose of the EU is to achieve closer integration (paras 129-137). A historical interpretation of Article 50 TEU furthermore supported this view: earlier versions of the provision resulted in various drafts that applied substantive conditions or required agreement to revoke notification all being rejected, in favour of the current text (paras 138-141).

### **Substance: conditions applicable to revocation**

Until paragraph 142, the AG's opinion reads as if in support of unilateral *unconditional* revocation; however, the option he described as (c) is considered from that point onwards. Following general comments on procedural requirements (namely that revocation notification required a formal act addressed to the European Council, and must also respect national constitutional requirements) in paragraphs 143 and 144, the AG somewhat controversially speculated as to what those specific requirements may look like in the UK, and observes that a 'reverse *Miller*' may apply: a Parliamentary Act was likely to be needed to 'de-notify' as it was to notify under Article 50 TEU. The reason these comments are controversial is not because the idea of *Miller* also applying to a revocation of withdrawal notification is unexpected, but rather because it is a matter that is beyond the scope of the CJEU's consideration - as the AG actually admitted, starting his observations in paragraph 145 with 'while this is an issue which falls to be determined by each Member State'.

Article 146 and 147 suggested that while a Member State cannot be asked to explain *why* it changed its mind, it is subject to a time limit: revocation of notification to withdraw must be issued within the two-year negotiation period that was started by Article 50 TEU or before a withdrawal agreement was formally concluded, as by that point the notification 'had already taken full effect'. The opinion was unclear on what happens if that two-year period is extended by unanimous consent of the European Council - if this extends the 'revocation'

period, or if the revocation remains only possible in the original two-year period.

The final 'condition' attached to a unilateral revocation of Article 50 TEU was the most important one set out by the AG:

148. A further limit on the exercise of the right of unilateral revocation arises from the principles of good faith and sincere cooperation (Article 4(3) TEU).

Here, the AG stressed his understanding for the Commission and Council's concerns regarding 'abuse' of Article 50 TEU: a Member State could engage in a rather endless cycle of threatening to leave *unless* better terms were reached, only to then ultimately stay if the negotiations for exit were not going to plan, and then immediately issue another notification again, to restart a negotiating period (paras 149-150). This would circumvent the actual text of Article 50 TEU, which only permits an extension of the two-year negotiation period with unanimous agreement from the Council; and the AG thought that these were the most 'substantial arguments in support of the position that unilateral revocation is not possible' (para 151). All the same, however, he did not believe them to be compelling enough. First, 'the possibility that a right may be abused or misused was, generally speaking, not a reason to deny the existence of that right' (para 152). The appropriate mechanism of dealing with potential abuses of rights is to outlaw them; and EU law does prevent abusive or fraudulent practices as a general principle, which applies to Article 50 TEU (para 153). Regarding 'tactical' revocations, the AG observed that it was not the unilateral revocation itself that would be 'abusive' – but rather an attempt to immediately notify to withdraw again *following* a revocation that would be (para 155). Finally, given that there were domestic constitutional conditions attached to filing and revoking notice under Article 50 TEU, 'tactical' revocations were unlikely to be numerous – they were likely to require significant changes of a legal or political nature that would not be easy to implement (para 156).

The AG consequently found that the answer to the referred question should be the following:

170. ...

When a Member State has notified the European Council of its intention to withdraw from the European Union, Article 50 of the Treaty on European Union allows the unilateral revocation of that notification, until such time as the withdrawal agreement is formally concluded, provided that the revocation has been decided upon in accordance with the Member State's constitutional requirements, is formally notified to the European Council and does not involve an abusive practice.

## 3. The CJEU Judgment

The CJEU issued its [judgment](#) on 10 December 2018.

Its findings in paragraphs 73-75 of the judgment, as summarised in the CJEU's [Press Release](#), are as follows:

- When a Member State has notified the European Council to withdraw from the European Union, as the UK has done, that Member State is free to revoke unilaterally that notification.
- That possibility exists for as long as a withdrawal agreement concluded between the EU and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two-year period from the date of the notification of the intention to withdraw from the EU, and possibly any extension, has not expired.
- The revocation must be decided following a democratic process in accordance with national constitutional requirements. This unequivocal and unconditional decision must be communicated in writing to the European Council.
- Such a revocation confirms the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State and brings the withdrawal procedure to an end.

### **Admissibility**

The CJEU summarises the UK's arguments regarding admissibility before noting that preliminary references regarding EU law 'enjoy a presumption of relevance' (para 27), meaning that a finding that a question is hypothetical is an exception rather than the rule. It stresses that in *Wightman*, the referring Court makes it clear there is a distinct dispute at play between (some of) the petitioners and the UK Government regarding the revocability of Article 50 TEU (para 29). It proceeds to note that earlier questions of admissibility were purely a matter of domestic law (paras 30-31), but that they have made clear that there is 'indeed a dispute before the referring court' (para 32) and that the referred question is related to the actual facts of that dispute (para 34). It consequently finds that the question referred is admissible (para 36).

### **Substance**

The CJEU proceeds to summarise the position of the petitioners in *Wightman* as being that, in the absence of explicit text in Article 50 TEU regarding revocation of a notice to withdraw, such a 'right ... exists and is unilateral in nature' – subject to it being exercised 'in accordance with the constitutional requirements of the Member State concerned', in an analogy to the Article 50 TEU text on issuing a notification to withdraw (para 37).

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It then proceeds to set out the Council and the Commission's position, which supports the concept of revoking an Article 50 TEU notice, but not that this can be done unilaterally, as this would enable abuse of the 'orderly withdrawal process' set out in Article 50 TEU – for instance, by revoking and then immediately re-notifying Article 50 TEU notice so as to extend the negotiating period without requesting permission to do so from the European Council (with unanimity) (paras 38-41).

The CJEU commences in a familiar fashion: by stressing that the EU Treaties are not 'ordinary' treaties, but rather established a 'new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights' (para 44). As such, the referred question should be considered not merely in light of the text of Article 50 TEU, but rather 'the Treaties taken as a whole' (para 46).

In paragraph 49, the CJEU judgment refers to the AG's analysis of the text of Article 50 TEU, noting that the word 'intention' is 'by its nature, neither definitive nor irrevocable'. Following an analysis of what the process for a Member State to notify such an intention to withdraw looks like under Article 50 TEU, the CJEU summaries the purpose of Article 50 TEU as such:

56. It follows that Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union, and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion.

Agreeing with the AG, the CJEU indicates that the 'sovereign nature of the right to withdrawal ... supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the European Union' for as long as the Article 50 TEU process remains ongoing (whether extended or not) (para 57). As such, 'in the absence of an express provision governing revocation of the notification of the intention to withdraw', the CJEU concludes that such a revocation will be subject to the same rules set out for notifying withdrawal: it can be done unilaterally, providing it is in accordance with national constitutional requirements (para 58).

The CJEU here stresses that revocation is a sovereign decision by a *Member State* to retain its status as a Member State – and that notifying under Article 50 TEU does not change this status (para 59). It finds that there is a difference between revoking notification and asking for a longer negotiating period to resolve withdrawal arrangements under Article 50 TEU, and as such, the Commission and Council's reasoning does not hold (para 60).

The remainder of the judgment considers how the Treaties justify this finding that a Member State *can* unilaterally revoke Article 50 TEU notice. The CJEU stresses that one of the purposes of the EU is to create an 'ever closer union' and to eliminate the 'barriers which divide Europe', and that the EU is also committed to 'liberty and democracy' as some of the founding principles of the EU legal order (paras 61-62). These are values that, in joining the EU voluntarily, all Member States

agree to uphold (para 63). The CJEU finally stresses that the consequences of a withdrawal will be a 'considerable impact on the rights of all Union citizens', and reminds that citizenship of the EU is 'intended to be the fundamental status of nationals of the Member States (para 64). Following this overview of principles underpinning the EU Treaties, it summarises:

65. In those circumstances, given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will.

Refusing a revocation of an Article 50 TEU notice *would* force a Member State to withdraw from the EU against its (changed) will, which runs contrary to the aims and values of the EU, and particularly the purpose of creating an 'ever closer union' (paras 66-67).

The CJEU next, in paragraph 68, repeats the arguments put forth by the AG to the effect that prior drafts of Article 50 TEU *had* contained clauses that would make expulsion of a Member State possible and would make withdrawing generally more complex, but these were rejected, with 'comments on the draft ... that the voluntary and unilateral nature of the withdrawal decision should be ensured' (para 68).

The CJEU thus finds that unilateral revocation is possible, so long as in accordance with domestic constitutional requirements *and* preceding the entry into force of a concluded withdrawal agreement or the end of the Article 50 TEU negotiating period (whether extended or not), as the Vienna Convention on the Law of Treaties (analysed in depth by the AG) suggest (paras 70-71). It explicitly rejects the Commission and Council's request for European Council unanimity as a condition for revoking an Article 50 TEU notice, as this would 'transform a unilateral sovereign right into a conditional right' and may have the consequence of forcing a Member State to leave the EU against its will (para 72).

### **Analysis**

There are various key points on which the CJEU judgment differs from the AG opinion. First, there is no mention of conditionality of unilateral revocation in the CJEU judgment; the concept of 'good faith' is not mentioned, and instead the sovereign power of the UK to both notify withdrawal and revoke notification of withdrawal is stressed. Indeed, the CJEU talks of an 'unequivocal and unconditional' decision made by the Member State. This removes a significant amount of uncertainty present in the AG Opinion's regarding what a 'bad faith' revocation, or a 'bad faith' re-notification', would look like, and who would assess if such a revocation was in 'good' or 'bad' faith. But the concept of an 'unequivocal' revocation accomplishes the same purpose: the goal of revocation must be to actually *stay* in the EU, not to alter the shape of negotiations.

The second significant change, or addition, to the AG Opinion is the CJEU's decision to emphasize that withdrawing notification will not result in *changed terms* for EU membership. The suggestion [has been made](#) by some EU officials that any decision to return to the EU would

result in the end of UK-specific membership terms, such as the [rebate](#), the opt-out from Schengen, and perhaps even the opt-out from the Euro. The CJEU here stresses that revoking a notification to withdraw or issuing a notification to withdraw does not *change* membership terms for any Member State, including the UK. It merely ends the withdrawal process, and changes to Member State status only commence when the withdrawal process is completed.

Third, unlike the AG, the CJEU does not speculate as to what the 'national constitutional requirements' for a decision to revoke Article 50 TEU notification may look like; it merely notes that such a revocation must follow a 'democratic process', which it leaves for the Member State to define, in line with national constitutional requirements.

Fourth, where the AG Opinion discusses the 'conclusion' of the WA as being the termination point for an ability for a Member State to unilaterally revoke Article 50 TEU notification, the CJEU stresses that the end point for the possibility of revoking an Article 50 TEU notice is not the 'conclusion' of the WA but rather its entry into force, *or* the expiry of the negotiating time period set out in Article 50(3) TEU.

What all of this means for the UK, in short, is that *if* a constitutionally valid domestic decision was taken to revoke the Article 50 TEU notice before the WA enters into force (or, if no WA is agreed, before the end of the Article 50 period), this would result in the UK remaining an EU Member State on the same terms that it is now, and such a domestic decision would not be subject to any form of approval at the EU level.

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