Treaty withdrawal—right of revocation of withdrawal notification—conditions of revocation—admissibility of preliminary ruling request by CJEU—Article 50 of the TEU—withdrawal of the UK from the EU

ANDY WIGHTMAN, ROSS GREER, ALYN SMITH, DAVID MARTIN, CATHERINE STIHLER, JOLYON MAUGHAM, JOANNA CHERRY v. SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION. Case C-621/18. Judgment, Preliminary Ruling Request. *At*: http://curia.europa.eu/juris/liste.jsf?num=C-621/18.

Court of Justice of the European Union (Full Court), December 10, 2018.

On December 10, 2018, the Court of Justice of the European Union (CJEU) sitting as a full Court, pursuant to the expedited procedure under Article 105 of its Rules of Procedure, issued a judgment in the *Andy Wightman, Ross Greer, Alyn Smith, David Martin, Catherine Stihler, Jolyon Maugham, Joanna Cherry v. Secretary of State for Exiting the European Union* case (hereinafter *Wightman*) concerning an October 3, 2018 request by the Scottish Court of Session, Inner House, First Division for a preliminary ruling under Article 267 of the Treaty for the Functioning of the European Union (TFEU) on the following question:

> Where, in accordance with Article 50 [of the Treaty for the 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? (Para. 16)

The CJEU held that the United Kingdom of Great Britain and Northern Ireland (UK) is allowed to unilaterally revoke the notification of its intention to withdraw from the European Union (EU) as long as the revocation is submitted in writing to the European Council before the UK's withdrawal takes effect, and as long as the revocation is "unequivocal and unconditional, that is to say that the purpose of that revocation is to confirm the EU membership of the member state concerned under terms that are unchanged as regards its status as a member state, and that revocation brings the withdrawal procedure to an end" (para. 74).

The Judgment is crucial for the process of the UK's withdrawal (or not) from the EU. For the EU, the Judgment fills a legal gap not expressly addressed in its founding treaties. For the UK, the Judgment broadened the UK Parliament's options. Under UK domestic law, the UK Parliament has to approve the withdrawal agreement between the UK and the EU.[1] If the withdrawal notification were irrevocable, Parliament would have only three options after authorizing the withdrawal notification: (1) approve the withdrawal agreement; (2) seek a renegotiation of the agreement; or (3) leave the EU without any agreement. The finding in *Wightman* that the withdrawal notification is revocable clarifies that there is another option: the UK Parliament may decide that the UK will remain in the EU.

In a June 23, 2016 referendum, UK citizens voted in favor (51.9 percent to 48.1 percent) of the UK's withdrawal from the EU. On January 24, 2017, the UK Supreme Court in *R (Miller & Anor) v. Secretary of State for Exiting the European Union*[2] declared that the

[1] European Union (Withdrawal) Act 2018, sec. 13.

[2] R (Miller & Anor) v. Secretary of State for Exiting the European Union [2017] UKSC 5 (hereinafter *Miller*).

https://doi.org/10.1017/ajil.2019.56 Published online by Cambridge University Press

government was obliged to receive the UK Parliament's approval before notifying the European Council of the UK's intention to withdraw. As the Supreme Court explained, under UK constitutional law, filing a notice under Article 50 of the Treaty for the European Union (TEU) exceeded the government's prerogative power to enter into and withdraw from treaties because it would lead to a modification of domestic law, remove rights, and frustrate the purpose of the European Communities Act 1972 and the European Parliamentary Elections Act 2002. However, *Miller* was not concerned with and did not address whether that notification is revocable (as it was common ground between the parties that it was irrevocable). On March 13, 2017, the UK Parliament enacted the EU (Notification of Withdrawal) Act 2017,[3] empowering the prime minister to notify the UK's intention to withdraw. On March 29, 2017, the UK notified the European Council in writing of the UK's intention to withdraw from the EU and the European Atomic Energy Community triggering the procedure under TEU Article 50, which provides:

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
>
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
>
> . . . .
>
> 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

On December 19, 2017, two members of the Scottish Parliament, Andy Wightman and Ross Greer, three members of the European Parliament, Alyn Smith, David Martin, and Catherine Stihler, a member of the UK Parliament (MP), Joanna Cherry, and Jolyon Maugham (the Petitioners) lodged a petition for judicial review in the Court of Session (Scotland, UK) seeking a declaration that the withdrawal notification under TEU Article 50 can unilaterally be revoked, and asked that the question be referred to the CJEU for a preliminary ruling. The first instance judge dismissed the petition and declined to make a preliminary request to the CJEU. The Petitioners appealed. The Court of Session (Inner House, First Division) allowed the appeal and requested a preliminary ruling by the CJEU.

[3] European Union (Notification of Withdrawal) Act 2017, ch. 9, sec. 1.

https://doi.org/10.1017/ajil.2019.56 Published online by Cambridge University Press

In the CJEU proceedings, the UK (and the European Commission) argued that the question was inadmissible (paras. 20–25), including because it was a request for an advisory opinion contrary to TFEU Article 218(11) (para. 23). The CJEU pronounced that it was admissible because: (1) the question was one of EU law (paras. 26–29), it was the point in dispute in the main proceedings (paras. 32–33) and was not hypothetical (para. 34); and (2) the request was not for an advisory opinion, but for an interpretation of EU law to enable the requesting court to give judgment (para. 35).

The petitioners and interveners (Chris Leslie MP and Tom Brake MP) submitted that a unilateral right of revocation exists and may only be exercised in accordance with the constitutional requirements of the EU member state concerned, by analogy with the right of withdrawal provided in TEU Article 50(1) (para. 37). The European Council and the European Commission argued that TEU Article 50 should be interpreted as allowing revocation only with the unanimous consent of the European Council (paras. 39–42). The UK government did not take a position on the right of revocation (para. 43).

The CJEU found that TEU Article 50 allows the member state that has notified its intention to withdraw to revoke that notification "unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements" before a withdrawal agreement concluded between that member state and the EU enters into force or, if no such agreement has been concluded, before the two-year period provided in TEU Article 50(3), which can be extended in accordance with that paragraph, expires (para. 8). The revocation's purpose "is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end" (para. 75).

To reach this conclusion, the Court interpreted TEU Article 50 in light of the EU founding treaties as a whole (para. 46). It recalled the special nature of those treaties: they established a new legal order, the subjects of which comprise member states and their nationals (para. 44). It relied on the wording of TEU Article 50, its objectives, its context, and the purposes of the EU legal order, as well as the provision's "origins" (para. 47). More specifically, the Court recognized that TEU Article 50 does not expressly prohibit or authorize revocation (para. 48). However, it: (1) enshrines the sovereign right of a member state to withdraw from the EU; and (2) establishes a procedure for such a withdrawal to take place in an orderly fashion (para. 56). Just as each member state has the sovereign right to withdraw, similarly, a member state has a right to revoke the withdrawal notification before the withdrawal takes effect (para. 57). The CJEU identified the object and purpose of the EU legal order in the preambles of the TEU and TFEU, as well as in TEU Article 1: the creation of an ever-closer union among the peoples of Europe and the elimination of barriers which divide Europe (para. 61); the values of liberty and democracy (para. 62); and the fundamental status of EU citizenship, including the right of EU citizens to free movement, which would be considerably affected by any withdrawal of a member state from the EU (para. 64). Given those objects and purposes, a member state cannot be forced to withdraw from the EU against its will (para. 65) where that will has been formed through a democratic process to reverse its decision to withdraw and to remain an EU member state (para. 66). Such a result would be inconsistent with the purpose of the founding treaties to create an ever-closer union among the peoples of Europe (para. 67). For this reason, it rejected the European

https://doi.org/10.1017/ajil.2019.56 Published online by Cambridge University Press

Council's and the European Commission's argument that the revocation right is subject to the European Council's unanimous approval (para. 72).

The CJEU further found that the "origins" of TEU Article 50 support a right of unilateral revocation (para. 68). TEU Article 50 largely adopts the wording of a withdrawal clause first set out in the draft Treaty establishing a Constitution for Europe.

> Although, during the drafting of that clause, amendments had been proposed to allow the expulsion of a Member State, to avoid the risk of abuse during the withdrawal procedure or to make the withdrawal decision more difficult, those amendments were *all rejected on the ground, expressly set out in the comments on the draft*, that the voluntary and unilateral nature of the withdrawal decision should be ensured. (*Id.*, emphasis added)

The CJEU found that its "conclusion is corroborated by [Article 68] of the Vienna Convention on the Law of Treaties [VCLT], *which was taken into account in the preparatory work for the Treaty establishing a Constitution for Europe*" (para. 70, emphasis added), and which provides "in clear and unconditional terms, that a notification of withdrawal . . . may be revoked at any time before it takes effect" (para. 71).

After *Wightman*, on February 19, 2019, the UK and the EU finalized the "Withdrawal Agreement."[4] In the face of the UK Parliament's failure to authorize conclusion of that agreement by the end of the two-year period prescribed in TEU Article 50(3) (i.e., March 29, 2019), the European Council and the UK agreed to extend the two-year period (pursuant to TEU Article 50(3)) to October 31, 2019. At the time of writing, *Wightman* continues to have practical relevance for the UK's withdrawal process.

* * * *

Neither TEU Article 50 nor any other provision of the EU founding treaties address the revocation of the notification of withdrawal. A major finding of *Wightman* is that the TEU's silence does not exclude such a right. The CJEU went further, sketching out the right of revocation, its nature, and the conditions for its exercise.

Interpreting TEU Article 50 and (implicitly) applying the customary international law rules on treaty interpretation set forth in VCLT Articles 31–32, the CJEU held that the right to revoke a withdrawal notification is unilateral and not subject to the European Council's unanimous consent. However, the Court subjected the unilateral right to the following safeguards. First, *a time condition*: the revocation can take place for as long as a withdrawal agreement concluded between that member state and the EU has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in TEU Article 50(3) (or the period as extended in accordance with that provision) has not expired (para. 69). This was the argument of the petitioners and interveners, and it was not contested by the UK government or the European institutions in these proceedings. Second, *a revocation notice has to be addressed to the European Council in writing*, similarly to the conditions for a withdrawal notification.

[4] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 62 OJ EU, 2019/C 66 I/01 (Feb. 19, 2019), *at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2019:066I:FULL&from=EN.

https://doi.org/10.1017/ajil.2019.56 Published online by Cambridge University Press

Third, the revocation must be made in an *unequivocal and unconditional manner*. Advocate General Campos Sánchez-Bordona proposed that "[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)."[5] The Court did not refer to such principles, nor does a requirement that the revocation is made in an "unequivocal and unconditional" manner address all aspects of the conduct that would be required by good faith and sincere cooperation. A revocation may be made in an "unequivocal and unconditional" manner, but might, for example, be in fact intended only to "pause" the process of withdrawal, because a further withdrawal notification is intended. Fourth, however and crucially, the revocation's *purpose* must be "to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end" (para. 75). The latter "purpose" excludes a revocation intended only to "pause" the withdrawal process. Although the Court did not expand further on this matter, that purpose can be identified in the document itself, the legislative or other measures taken by the revoking state, and the revocation's circumstances.

Fifth, and crucially, revocation can be notified only *after* the member state concerned has taken the revocation decision *in accordance with its constitutional requirements*. These will differ from member state to member state. The CJEU's reasoning in this respect draws from the democratic values enshrined in TEU Article 1.[6]

Finally, *Wightman* does *not* prohibit a member state from notifying its intention to withdraw again pursuant to TEU Article 50(1) after it has revoked the initial withdrawal notification. As the corollary of the sovereign right of a state to become an EU member state (para. 63), the unilateral right of withdrawal remains available to the member state that has revoked an earlier withdrawal notification.

Beyond this particular dispute, *Wightman* is relevant for general international law. VCLT Article 68 reads: "A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect." VCLT Article 68 is concerned with two types of revocation: (1) that of the *notification* under VCLT Article 65(1), which allows a party to invoke grounds of invalidity, termination, withdrawal from, or suspension of a treaty; and (2) that of the *instrument* under VCLT Article 67(2) communicated to the other parties, which "executes" the measure notified under VCLT Article 65(1) and which takes effect upon its receipt by the other parties (VCLT Article 78), unless the treaty provides otherwise (or another agreement has been made). TEU Article 50 concerns the revocation of the withdrawal notification (akin to VCLT Article 65(1)). TEU Article 50(3) dispenses the need for a withdrawal instrument and provides that withdrawal may take effect on the date of entry into force of the withdrawal agreement or, failing that, two years after the withdrawal notification, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period.

[5] Opinion of Advocate General Campos Sánchez-Bordona, para. 148 (Dec. 4, 2018) (hereinafter AG Opinion).

[6] On the basis of *Wightman*, the European Council may consider whether the revoking member state has met the revocation requirements and could refuse to accept the notification as invalid. In such case, the revoking member state may seek proceedings before the CJEU challenging that decision. Assuming that the Court finds that the revocation has not been made lawfully, whether the time prior to when withdrawal takes effect continues to run during the proceedings is unclear (this may be crucial if revocation is submitted close to the time when withdrawal is to take effect).

https://doi.org/10.1017/ajil.2019.56 Published online by Cambridge University Press

The CJEU did not examine whether the VCLT, and especially VCLT Article 68, applied to the TEU. The VCLT applies to treaties between states concluded after the entry into force of the VCLT Article 4, including treaties creating an international organization, such as the EU (VCLT Article 5). However, the VCLT does not apply to the TEU, because not all twenty-eight EU members are VCLT parties (e.g., France and Romania are not parties).

The question thus arose whether a customary international law rule concerning revocation exists, and if so, if it applies to the TEU (or instead, if the TEU, as *lex specialis*, has displaced general international law in this respect). Neither the CJEU's pronouncement, nor the advocate general's Opinion, offer authority as to the customary status of the rule in VCLT Article 68. For the advocate general, it was unclear whether VCLT Article 68 sets forth a rule of customary international law;[7] instead he proposed that EU law should be interpreted with some "guidance" from that treaty provision. The CJEU did not address whether VCLT Article 68 reflects customary international law. Instead, it relied on VCLT Article 68 as a supplementary means of interpretation (VCLT Article 32) in order to confirm the interpretation it reached that TEU Article 50 encompasses a unilateral right of revocation. It noted that VCLT Article 68 "was taken into account in the preparatory work for the Treaty establishing a Constitution for Europe" (part of the "origins" of the TEU) (para. 71).

The unilateral right of revocation under VCLT Article 68 represents the priority given to "the stability of treaties."[8] The VCLT was negotiated on the basis of the Draft Articles on the Law of Treaties that had been prepared by the International Law Commission (ILC). In the ILC, some debate took place about whether states should be given such a freedom, since revocation may affect other treaty parties, who, having been notified of the withdrawal, have begun preparing for the treaty's termination or the withdrawal of the party concerned.[9] However, the ILC decided to retain the revocation provision because the considerations "militating in favour of encouraging the revocation of notices and instruments of denunciation, termination, etc. [were] so strong,"[10] and it considered that "the right to revoke the notice is implicit in the fact [that termination does not] become effective until a certain date,"[11] and in the "power to give notice [of withdrawal]."[12] In this respect, the underpinning rationale of VCLT Article 68 coincides with the finding in *Wightman* in favor of stability of treaty relations within the EU legal order, although the CJEU's reasoning is more influenced by the special purposes of the treaty in question: democratic values; EU citizenship; and the elimination of barriers dividing Europe.

VCLT Article 68 does not provide for the modalities of revocation of either the notification or the instrument in VCLT Articles 65(1) and 67(2) (other than the time condition, treated similarly in *Wightman*). However, logically, a revocation under VCLT Article 68 has to take the same form as the notification being revoked. In this respect, VCLT Article 68 coincides with *Wightman*. Further, although VCLT Article 68 does not require that revocation is

[7] AG Opinion, *supra* note 5, para. 80.

[8] Summary Records of the Fifteenth Session (May 6–July 12, 1963), UN Doc. A/CN.4/SER.A/1963, 1 INT'L L. COMM'N Y.B., at 164, Art. 24, para. 23 (1963) (Yasseen) [hereinafter Summary Records].

[9] *Id.*, paras. 25–26 (Tsuruoka).

[10] Draft Articles on the Law of Treaties with Commentaries, UN Doc. A/6309/Rev. l, II INT'L L. COMM'N Y.B., at 264, Art. 64, para. 2 (1966).

[11] *Id.*

[12] *See* Summary Records, *supra* note 8, at 165, para. 33 (Elias).

https://doi.org/10.1017/ajil.2019.56 Published online by Cambridge University Press

"unequivocal and unconditional" and that its purpose is to confirm the status of the treaty party, as *Wightman* required, it could be argued that under general principles of law, any right, including that envisaged in VCLT Article 68, has to be exercised in good faith and that an abuse of such right is prohibited.

Crucially, however, and contrary to the finding in *Wightman*, VCLT Article 68 is unconcerned with domestic law: a violation of domestic constitutional law would not render the revocation devoid of legal effect under international law. One might argue by analogy to VCLT Article 46 that the consent to give such revocation is invalid because a manifest violation of a domestic rule of fundamental importance has taken place, such as a requirement of parliamentary approval. However, there is no evidence that such a rule exists vis-à-vis a unilateral act, or that VCLT Article 68 was intended to give such deference to domestic law after revocation has been made.

The ruling in *Wightman* that conditions the withdrawal revocation on observance of domestic constitutional requirements constitutes EU practice in the application of the EU founding treaties and is relevant to the interpretation of those treaties.[13] Given the CJEU's significant focus on the particular features of the TEU and the EU legal order, it seems unlikely that *Wightman* and any future implementation by EU member states would constitute practice as a constitutive element of a customary rule concerning withdrawal revocation from treaties in general. However, it may offer guidance (and may consolidate future practice) about special unilateral revocation conditions in treaties of a similar character to that of the EU founding treaties. It remains to be seen how other states and international organizations may react to the reasoning in *Wightman*.

Danae Azaria
University College London (UCL), Faculty of Laws
doi:10.1017/ajil.2019.56

United States Supreme Court—international organizations—immunity from suit in U.S. courts

Jam v. International Finance Corp., No. 17-1011. *At* https://www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf.
United States Supreme Court, February 27, 2019.

In *Jam v. International Finance Corp.*, the U.S. Supreme Court held that the International Organizations Immunities Act of 1945 (IOIA) affords international organizations (IOs) the same immunity from suit in U.S. courts that foreign governments currently enjoy under the Foreign Sovereign Immunities Act of 1976 (FSIA), which codifies the restrictive theory of foreign sovereign immunity. The International Finance Corporation (IFC) had argued that the IOIA, which grants international organizations the "'same immunity' from suit . . . 'as is enjoyed by foreign governments'" (p. 15), should be understood to provide international organizations with absolute immunity, which it argued foreign governments

[13] Int'l L. Comm'n Rep., Text of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties with Commentaries, at 93, Conclusion 12(3), UN Doc. A/73/10 (2018).