

# Case C-621/18 *Wightman v Secretary of State for Exiting the European Union*: the CJEU emphasises the Sovereignty of a Member State in exercising its rights under Article 50 TEU

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Judgment from the CJEU in the *Wightman* case was delivered on the 10<sup>th</sup> of December, in which the Court of Justice ruled that the notification by a Member State of its intention to leave the EU was unilaterally revocable by the Member State. In doing so, the Court emphasised that the Sovereignty of the Member State concerned was a key element to this decision, and to decide otherwise would interfere with the freedom that Member States enjoy to either apply to join or to leave the EU in accordance with the procedures set out in the Treaty on the European Union.

This has therefore provided timely clarification of the position of the applicants in this case regarding the options available to the UK Parliament in advance of the ‘meaningful vote’ due to take place in Parliament. The judgment itself makes a number of important points and it is these that I would like to discuss in this blog. It also differs slightly from the Opinion delivered by the Advocate General in this case last week.

## **Admissability**

As was expected, the Court dismissed the arguments for inadmissibility of the case on grounds of it being hypothetical or advisory only. The Court found that what it was dealing with here was a genuine dispute. The Court, in arriving at this conclusion, noted the presumption that a case is relevant if it is seen as such by the referring court, as it is they who bear the responsibility for the subsequent decision in the case (Para. 26). The Court will only refuse

to answer a reference made by a Member State court in situations where the question asked is not relevant to the case at hand. This was clearly not the situation here, as the issue of revocability of Article 50 TEU was at the heart of the case brought by the Applicants in this case (Para. 27).

The Court also pointed out that the fact that the UK Government held no position regarding the revocability of Article 50 TEU was irrelevant to the existence of a dispute, seemingly acknowledging that it was a choice of the UK Government not to take a position on this (Para. 32). In this regard they referred to the earlier case of *Afton Chemical*, C-343/09.

The important point here, as far as the Court was concerned, as the existence of a provision of primary EU Law that was in need of clarification, and on this basis, it was important for the Court to rule on this matter. They therefore dismissed the UK Government's claim of inadmissibility. This therefore allowed them to go on to consider the substance of Article 50 itself, which (unlike the AG) it would not have been able to do, if it had considered the case inadmissible.

### **Interpretation of Article 50 TEU**

In interpreting the meaning of Article 50, the Court took an approach that treated the issue of interpretation as a matter which should be considered in the light of the Treaties as a whole, (Para. 46) and not just Article 50 in isolation. This approach was necessary because the interpretation here was as to matters that Article 50 TEU was silent about, and therefore the amount of inference from wording within Article 50 TEU itself was somewhat limited. It also pointed out that in taking this 'whole' approach, it did so because it was not just the objectives and wording of Article 50 that was important, but its purpose and context within the Treaties as a whole. It concluded that Article 50 had two purposes: "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." (Para. 56)

However, where the Court was able to deduce meaning from particular wording in Article 50(2), in line with the Paragraphs 99 to 102 of the AG Opinion, it also confirmed that the notification in Article

50(2) was only as to “intention”, and therefore did not serve to bind the UK irrevocably into exiting from the EU if it subsequently changed its position and wished to remain. This would logically be in line with the Court’s consideration that Article 50 reflect the sovereignty that the UK had in its control of the activation and revocation of the process.

### **Revocability of Article 50 TEU**

The above point was emphasised in the discussion of the revocability of Article 50 TEU. In discussing this issue, the Court made liberal use of the word “sovereignty”, which featured prominently in the judgment itself. This was cited as the basis upon which a departing Member State could revoke its Article 50 notification. The Court cited the objectives and shared values of the EU in the preamble to both the TEU and the TFEU, and the fact that a state that wished to join the EU under Article 49 TEU was voluntarily doing so. That sovereign right to decide to apply to join the EU was therefore also mirrored in the sovereign right of a Member State to leave if it so wished.

This mirroring of joining and leaving is an important element of the sovereignty argument discussed in the judgment. The Court commented that a Member State could not be forced to accede to the EU, and therefore correspondingly they could not be forced to leave either. This was an important part of the discussions around the predecessor to Article 50 in the Constitutional Treaty, in particular regarding the ability to expel a Member State if it abused the withdrawal process. It was felt at the time “that the voluntary and unilateral nature of the withdrawal decision should be ensured.” (Para. 68)

This picked up on a point raised in the AG Opinion, whereby the interests of every Member State are protected in that it was not possible to force a Member State out of the EU against its will. Accepting this principle, and the fact that the Article 50 notification merely expressed an intention; to prevent a Member State from changing its policy and attempting to withdraw its notification during the 2-year process under Article 50(2) would amount to forcing a Member State to leave the EU with its only option to re-apply under Article 49 TEU.

## The Consequences of Revocation

There has been a certain amount of speculation regarding the consequences for the UK as a result of revocation of Article 50 TEU. It has been suggested that the position of the UK and its circumstances within the EU would be fundamentally changed. The UK currently has an opt-out from the Euro, an opt-out from the Schengen Agreement, and a rebate on its budget contributions. It has been suggested that one or all of these things would be under threat in the event of the UK triggering the Article 50 process and then choosing to remain a Member State.

The Court was unequivocal about this however, and stated:

“The revocation by a Member State of the notification of its intention to withdraw, before the occurrence of one of the events referred to in paragraph 57 of the present judgment, reflects a sovereign decision by that State to retain its status as a Member State of the European Union, ***a status which is not suspended or altered by that notification.***” (emphasis added).

The judgment from *RO*, C-327/18 PPU was cited in support of this argument – EU law is as applicable after notification and right up to the point of exit of the UK as it was before, and therefore “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” (Para.74).

## Potential for Abuse of Revocability

A key element of the AG Opinion in this case was addressing the Commission and Council’s concerns regarding abuse of the Article 50 TEU process by a Member State using unilateral revocability as a tool to manipulate the process. The AG made much of the concept of ‘good faith’ as a guard against such abuse by a departing Member State, and argued that this was therefore a condition of the ability to revoke. This in itself challenges the unilateral nature of the revocability, and the Court’s judgment has not discussed this concept in their ruling. They did however make the following comments in addressing the issue of abuse:

- Anything that prevented the unilateral nature of a decision to revoke by a departing Member State was rejected in the drafting of the predecessor to Article 50 in the Constitutional Treaty. The voluntary nature of entering and exiting the EU, and the expression of sovereignty that this produces, were considered more important.
- The arguments of the Council and Commission were directly refuted by the Court in stating that to require approval for a revocation would essentially transform a sovereign right into a conditional one, and therefore this would be incompatible with the point above about states taking voluntary acts.
- This therefore meant that as long as the 2 year time limit (or any extended time as approved by the Council) had not expired, and as long as there was not a fully ratified withdrawal agreement in place, then the departing Member State retained the right to revoke unilaterally.
- The Court agreed that in order for this revocation to have effect, it must take place in accordance with the State's own constitutional requirements, and this again aligns with the Opinion of the AG. However, instead of any mention of good faith, the Court instead insisted that revocation must be "unequivocal and unconditional, that is to say that the purpose of that revocation is to confirm the EU membership of the Member State concerned ... and that revocation brings the withdrawal procedure to an end." (Para.74) This would therefore act as a safeguard against the specific possibility of a Member State attempting some form of Article 50 "hokey cokey" in order to manipulate the procedure.

The net result of this decision is that we now know that Article 50 TEU notification is definitely unilaterally revocable. However, the approach of the Court of Justice went further than the Opinion of the AG. The Court pushed the emphasis far more in the direction of the notion of sovereignty, something which has been downplayed by the UK Government since the referendum in 2016. The UK has sovereignty as an EU Member State, and retains that sovereignty because every aspect of being in the EU, as well as joining and leaving, is based upon the concept of Member States voluntary participation in the organisation, which they are free to withdraw through the Article 50 process.