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2019

Abuse of the Law and "Abnormal" Law Versus Rule of Law

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Abuse of the Law and "Abnormal" Law
Versus Rule of Law

Dedicated in Honor of
Acad. Prof. Slobodan Perović
Founder of the
Kopaonik School of Natural Law

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2019

Злоупотреба на правото и „ненормалното“ право наспроти владеење на правото

Посветена во чест на животот и делото на
Акад. проф. д-р Слободан Перовиќ –
основноположник на
Копаоничката школа на природното право

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ЈУРИДИКА ПРИМА

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*Ivica Josifovic, Phd**

THE FUTURE OF ARTICLE 50: IMPLICATIONS FROM THE WIGHTMAN CASE

UDK:341.171(4-672EU:410)
Original Research Paper

Abstract:*Based on the results from June's 2016 referendum on the issue of withdrawal of the UK from the EU, known as Brexit, on 29th of March 2017 the UK triggered article 50 of the Treaty on European Union (TEU), thus starting the two year process in which the EU and UK should determine the conditions for UK's withdrawal from the Union. On 14th of November 2018, as a result of Brexit negotiations, an agreement between the EU member-states and the UK was endorsed on the withdrawal of the UK from the EU, but the process that should have ended on 29th of March 2019 was moved for 31st of October 2019, due to failure in its ratification in the UK's Parliament.*

Meanwhile and simultaneously with the negotiations and the withdrawal procedure, another procedure takes place in the background and it is central for this paper.Without explaining the Brexit procedure, the paper elaborates the preliminary ruling procedure according article 267 of the Treaty on Functioning of the European Union (TFEU) in the Wightman case and the possibility of revoking the notification for withdrawal from the EU according article 50 of the TEU. Therefore, besides the case facts that triggered the preliminary ruling procedure before the Court of Justice of the European Union (CJEU), the paper elaborates the significance of the question referred tothe Court, for which the Advocate General delivered its opinion and the Court delivered its judgment.

Key words: *Wightman, Court of Justice, Article 50, Judgment*

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CASE FACTS

Article 50[1]

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.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

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.

The case was brought by several members of the Scottish Parliament headed by Andy Wightman, who at the end of 2017, in a proceeding involving the UK Parliament, took actions in order to receive an answer from the Scottish Court on a simple, but very significant question regarding the unilaterally revocation of the article 50 notification to withdraw from EU membership. The applicants argued that Brexit is not one-way and that those voting for a stay in the EU do not necessarily have to agree on EU and UK arguments that there must be "deal or no deal". Instead, there is a third possibility: people's vote with option to stay in the EU.

In order for the Scottish Court to rule on the legal matter, it must refer to the CJEU under article 267 of the TFEU since article 50 of the TEU is a provision of the EU law and only the CJEU gives interpretation of the EU

[1] Consolidated versions of the Treaty on the Functioning of the European Union, [2012], OJ L C 326/47.

law for the EU as a whole. Without going into conditions under which the CJEU acts in the preliminary ruling procedure, because of the nature of the matter and the decisions of national courts, it is worth to mention that the CJEU during the years established its own conditions under which gradually abandoned the practice to act automatically on referring of national courts, determining its own jurisdiction for preliminary ruling. In doing so, it began by understanding its role under article 267 of the TFEU as an assistant to national courts and not as an advisor on any issues related to the EU law. The usual formula in which the conditions for Court's actions in this regard are grouped, says that CJEU shall not act on a question in preliminary ruling procedure when: a) the question is obviously not related to the facts and the decision to be made; b) the question relates to a hypothetical issue; and/or c) when the Court has not been provided with the sufficient factual and legal material in order to useful answer to it.So, in February 2018, the Scottish Court ruling on the matter submitted for revocation of the notification under article 50, found that it was purely hypothetical, that it was not a legal matter eligible for judicial review and with no real prospect of success, hence the application was rejected, since it was determined that the UK Parliament has no desire to withdraw from Brexit.[2]

However, the applicants appealed to the lower court's ruling to refer the matter to the CJEU. Given the constitutional significance of the matter, the judges accepted the appeal and returned the case for reconsideration, concluding that the lower court's judgment wasrather complicated, unclear and confusing; that the matter does not fall into those identified as hypothetical and for which the CJEU would not have been able to act, given that the UK Government could be asked to revoke the notification under article 50 of the TEU at the request of the UK Parliament.

After additional submissions in June 2018, the lower court ruled the same because of the hypothetical nature of the matter, thus any possibility to refer to the CJEU was rejected.[3] During the decision-making, the withdrawal act was still in preparation through the UK Parliament and therefore no final date for EU withdrawal was confirmed.[4] Instead, the date for withdrawal is set

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[2] Case P1293/17, *Petition of Andrew Wightmanand Others for Judicial review on the issue of the unilateral revocability ofa Article 50 of the Treaty on European Union*[2018] Opinion of Lord Doherty, CSOH 8, <>, accessed 20 August 2019.

[3] Case P1293/17, Andrew Wightman and Others for Judicial Review against Secretary of State for Exiting the European Union [2018], Opinion of Lord Boyd of Duncansby, CSOH 61, <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csoh61.pdf?sfvrsn =0>, accessed on 20 August 2019.

[4] European Union Withdrawal Act [2018], <http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en. pdf> accessed on 20 August 2019.

only as a matter of EU law under conditions from article 50, paragraph 3 of the TEU, i.e. the date of entry into force of the withdrawal agreement or two years after the notification of article 50.

As abovementioned, the CJEU does not consider hypothetical questions brought by national courts concerning EU law. The preliminary ruling procedure is a cooperation between national courts and the CJEU, in order to provide assistance to national courts to rule on cases where the interpretation of the EU law is essential for resolving the case in front of the national court. After considering the question, the lower court found that it was a hypothetical question that should not be answered in order to reach a judgment.

Also, the applicants in their case, objected the UK's ministers position that article 50 could not be unilaterally revoked. The judges rejected any detailed discussion on legal suitability of the UK's minister position for revocation of article 50 on grounds that if this is done it would be contrary to Parliamentary privilege and contrary to article 9 of Bill of Rights.

The applicants appealed to the higher court where their claim was successfully accepted. The judgment of the higher court was delivered on 21 September 2018 on several grounds.[5] First, the UK's Government claims that the judicial review is incompetent because the request was impractical was rejected. Second, it is considered that the question is justified because of the existence of controversy regarding the Parliamentary process. Third, the Court also found that the case is not hypothetical since the first judgment, the judgment on appeal and parts of the Withdrawal Act entered into force.

However, Wightman and others claimed that the deadline by 29th of March, now 31st of October 2019 does not necessarily refer to "deal or no deal", but instead that there is an alternative according which UK citizens could vote for the agreement conditions, including the option to remain in the EU. Such option gets even bigger meaning after the failure to apply the deadline for UK's automatic exit that ended on 29th of March or to obtain the consent from member-states to extend the article 50 period or to unilaterally revoke the notification from article 50 of the TEU. If none of these options can be secured or the period until the 31st of October expires, it is clear that there will be no enough time to organize a new referendum for UK's membership in the EU.

In their request for a preliminary ruling procedure before the CJEU, the Scottish judges approved the text of the question that looked like this: "Where, in accordance with Article 50 of the TEU, a Member State has notified the

[5] Case P1293/17,*Andy Wightman and Others against Secretary of State for Exiting the European Union*[2018] opinion of Lord Carloway, CSIH 62 <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/ 2018csih62.pdf?sfvrsn =0> accessed on 21 August 2019.

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 EU."

Given that the time was essential for the case, the Scottish court expressly requested the use of expedited procedure under article 105 of the CJEU's Rules of Procedure.[6]The average time for the CJEU to deliver a judgment according the procedure under article 267 of the TFEU is 15.7 months.[7]Such timeframe, four months from the time of referring until the expire of the deadline, before the extension, could have made the judgment only a formality, because even with the expedited procedure, the Court would need at least five months to deliver its judgment. Even this timeframe was problematic, since the UK and the EU agreed a settlement of withdrawal on 13th of November 2018.[8]

However, the Court overcame itself. It received the referring on 3rd of October 2018 and because of the seriousness and the expedited procedure it started with the first hearing on 27th of November 2018.[9]The UK Government formally opposed to this request on several grounds. First, the UK Government issued a political document that the question is still hypothetical and that the CJEU overstepped its role.[10]I disagree with this. As a horizontal judicial process for cooperation between national courts and the CJEU, the national court is the one to determine the appropriateness of referring a question of the EU law to the CJEU.As such, it is the judges who are considering the case to assess whether there is a need of referring to the CJEU in order to enable them

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[6] Rules of Procedure of the Court of Justice of 25 September 2012, [2012] OJ L 265, as amended on 18 June 2013, [2013], OJ L 173, on 19 July 2016, [2016], OJ L 217, and on 9 April 2019, [2019], OJ L 111.

[7] Judicial Activity, *Annual Report 2017* [2018] <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/_ra_ 2017_en.pdf> accessed on 22 August 2019.

[8] Communication from the Commission to the European Parliament, the European Council, the Council, The European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank *'Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan'* [2018], COM(2018) 880 final, <https://eur-lex.europa.eu/resource.html?uri=cellar:3dd5b905-e829-11e8-b6 90-01aa75ed71a1.0001.02/DOC_1& format=PDF> accessed 25 August 2019.

[9] Alastair Macdonald and Gabriela Baczynska, 'EU court sets Nov. 27 hearing on Brexit reversal case' *Reuters* (Brussels 7 November 2018), <https://www.reuters.com/article/us-britain-eu-ecj/eu-court-sets-nov-27-hearing-on-brexit-reversal-case-idUSKCN1NC1NA> accessed 25 August 2019

[10] Department for Exiting the European Union, *Wightman and Others v Secretary of State for Exiting the European Union*, (Policy Paper, 6 November 2018), <https://www.gov.uk/government/publications/wightman-and-others-v-secretary-of-state-for-exiting-the-european-union/wightman-and-others-v-secretary-of-state-for-exiting-the-european-union>accessed 25 August 2019.

to deliver a judgment. Second, if this is the case, than the answer of the CJEU is not only advisory, but binding and national judges cannot give their own or different or contrary interpretation.

Another UK's Government approach in taking exception to this reference from the Scottish Court was to challenge the process of requesting assistance from the CJEU.The Scotland's Advocate General argued that the appropriate course on this matter should have been another appeal to the UK's Supreme Court for adjudication and not for referring to the CJEU. On 8th of November 2018, the Higher Court, despite the documents submitted in order to cancel the referring to the CJEU, ruled out the possibility to refer the case to the Supreme Court.[11] This clearly shows the poor legal understanding of EU law principles. It is a good established doctrine according which the preliminary ruling procedure under article 267 of the TFEU is not an appeal mechanism and national courts are free to submit requests to the CJEU, free of any interference from higher national courts. Member-states Supreme courts are also free to issue guidelines for lower courts when they refer to the CJEU, as well as the CJEU itself issues guidelines on how these references on EU law should be made, although these guidelines cannot restrict the wide discretion national courts have in making their decision on the appropriateness of referring under article 267 of the TFEU.[12]

ADVOCATE GENERAL'S BORDONA OPINION

Before looking at the CJEU's judgment in the Wightman case regarding the unilateral revocation of the notification of withdrawal from the EU under article 50, it is quite useful to consider the Opinion of Advocate General Campos Sanchez Bordona (AG), which, although non-binding, the judges carefully examined and worth discussing on issues that raised.[13]

At the beginning, AG's opinion rejected the UK's Government claims that the case is hypothetical, because the Government had not decided on revoking the notification under article 50 and had no such intention. Further, the opinion agrees with the applicants that the notification is in principle unilaterally revocable, indicating that article 50 contains nothing regarding

[11] Case P1293/17, Statement of Reasons delivered by Lord Carloway in the reclaiming motion by Andy Wightman and Others against Secretary of State for Exiting the European Union [2018], <https://www.theguardian.com/politics/2018/ nov/08/uk-cannot-stop-brexit-article-50-case-going-to-ecj-says-scottish-court> accessed 26 August 2019.

[12] Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings, [2016], OJ L 439/01.

[13] Case 621/18, *Andy Wightman v Secretary of State for Exiting the European Union*[2018], Opinion of AG Bordona, ECLI:EU:C 2018:978.

revocation and thus refers to three possible outcomes: no revocation, unconditional revocation or conditional revocation.The opinion examines the question of unilateral revocation first from an international law aspect and then according the article 50 wording.

As for the international law, the opinion gives no concrete answer whether the unilateral revocation of the notification for withdrawal from international treaty is a matter of international common law, although is stipulated in the Vienna Convention on the Law of Treaties (VCLT).[14]The reason for such uncertainty is whether the VCLT could apply for EU withdrawal in which principles of supremacy and direct effect are in place, just to conclude that it cannot be applied, since the EU itself and some of its member-states are not parties of the Convention. Still, the AG argues that the VCLT might be useful for interpretation of article 50.

As for the interpretation of article 50, literal interpretation does not resolve the question, since article 50 do not refer to unilateral revocation of the withdrawal notification. Therefore, the AG proceeded on examining the context of article 50. It started with the national phase "exclusively for the departing member-state", when deciding for its intention to withdraw, and "only conditional upon having been adopted in accordance with that State's own constitutional requirements".[15] The obligation to notify the European Council (EC) of the intention to withdraw and the two-year period to negotiate the agreement in which that intention will be embodied are only formal elements and do not limit the unilateral nature of the initial decision to withdraw.A logical consequence is the unilateral authorization to revoke such a decision as "a manifestation of that state's sovereignty".[16] So, the procedure continues in "the negotiation phase, which begins with the notification of the intention to withdraw to the European Council and culminates two years later, unless there is an extension by unanimous decision of the Council".[17] Generally, "as occurs in other areas of law, in the absence of an express prohibition or a rule which provides otherwise, whoever has unilaterally issued a declaration of intent addressed to another party, may retract that declaration until the moment at which, by the addressee's acceptance, conveyed in the form of an act or the conclusion of a contract, it produces effects".[18]

Next, the opinion notifies that the article 50, paragraph 2 of the TEU refers to notification of "intention" of withdrawal, "not the withdrawal itself,

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[14] Vienna Convention on the law of treaties,No. 18232, [1969]

[15] Case 621/18, *Andy Wightman v Secretary of State for Exiting the European Union*[2018], Opinion of AG Bordona …, op. cit., paragraphs 91 and 92.

[16] Ibid, paragraph 93.

[17] Ibid, paragraph 95

[18] Ibid, paragraph 98.

because withdrawal may only occur after the agreement is reached or, in the absence of an agreement, after two years have elapsed".[19] According AG, "Intentions are not definitive and may change. Whoever notifies his intention to a third party may create an expectation in that party, but does not assume an obligation to maintain that intention irrevocably".[20]Also, the AG refers to two possible scenarios. First, it refers to the possibility that "the withdrawal decision may be annulled, if the body having authority (ordinarily the highest courts of each State) holds that that decision was not adopted in accordance with the constitutional requirements".[21]Second, "as a result of action carried out in accordance with its constitutional requirements (for example, a referendum, a meaningful vote in Parliament, the holding of general elections which produce an opposing majority, among other cases), the member-state's initial decision is reversed and the judicial and constitutional basis on which it was sustained subsequently disappears", for which "that State can and must notify that change to the European Council".[22]Under these circumstances, on the one hand, "to insist on negotiating the agreement for withdrawing from the Treaties … is a result contrary to common sense", and on other hand, accepting the withdrawal shall "respect" the role of national parliament as part of member-state's national identity.[23]The possibility of rejoining the EU is not contrary to this interpretation, since there is no logic to spend the article 50 two-year period on negotiating future membership. And as we will see below from the CJEU's judgment, a member-state remains a member-state during the article 50 period.[24]

Regarding the argument on unilateral revocation, the AG is on a standpoint that it will strengthen the Treaties provision for "closer union", "national identities of the member-states", and "protection of the rights acquired by EU citizens" and that all this is part of historical background of previous versions of article 50 and that supports the same outcome.[25] However, the AG point out the existence of several conditions. First, there must be a formal notification of revocation, according the notification to withdraw. Second, national constitutional requirements must be respected. While accepting that "this is an issue which falls to be determined by each member-state", he argues that the in UK, the condition include "prior parliamentary authorisation for the notification of the intention to withdraw" and logically "the revocation of that

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19 Ibid, paragraph 99.
20 Ibid, paragraph 100.
21 Ibid, paragraph 104.
22 Ibid, paragraph 105.
23 Ibid, paragraph 106.
24 Ibid, paragraph 114.
25 Ibid, paragraphs 129-135.

notification also requires parliamentary approval". Third, there is no need to justify the revocation of notification of withdrawal.[26]

The AG paid attention on temporal limit under article 50, paragraph 2 of the TEU, as well as on limits under article 4, paragraph 3 regarding principles of good faith and sincere cooperation. According the temporal limit under article 50, paragraph 2 of the TEU, the revocation "is possible only within the two-year negotiation period that begins when the intention to withdraw is notified to the European Council" and "once the withdrawal agreement has been formally concluded, which implies the agreement of both parties, it is no longer possible to revoke the notification".[27]Regarding principles of good faith and sincere cooperation under article 4, paragraph 3 of the TEU, the European Commission and the Council raised concerns that member-state "could revoke its notification and halt the negotiations if they were not favourable to it" and "resubmit its notification of intention to withdraw, thus triggering a new two-year negotiation period", thusbypassing the time constraints of the process.[28]But, the AG rejected these arguments: "the possibility that a right may be abused or misused is, generally speaking, not a reason to deny the existence of that right".[29]Rather, the abuse must be prevented through the use of the appropriate legal instruments. The established principle of misuse of rights must be "be applied in the context of Article 50, if a member-state engaged in an abusive practice of using successive notifications and revocations in order to improve the terms of its withdrawal from the European Union".[30]

There is no indication that every misuse is planned and "any abuse could occur only when a second notification of the intention to withdraw is submitted, but not by unilaterally revoking the first".[31]In AG's standpoint, a large number of "tactical revocations" would be extremely difficult, as the revocation is a decision adopted in "accordance with its constitutional requirements" and thus functions as a "filter which acts as a deterrent in order to prevent the abuse of the withdrawal procedure laid down in Article 50 TEU through such tactical revocations".[32]At the end, the opinion accepts that the revocation may be agreed, in case of request by member-state and unanimous decision of the EC.

So, what can we say about this review of the AG Bordona's opinion before going into the essence of the judgment. First, the opinion strongly

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[26] Ibid, paragraphs 143-145.
[27] Ibid, paragraph 147.
[28] Ibid, paragraphs 149-150.
[29] Ibid, paragraph 152.
[30] Ibid, paragraph 153.
[31] Ibid, paragraph 155.
[32] Ibid, paragraph 156.

argues that the matter is not hypothetical. It rightly refers to the CJEU's case-law according which references from national are considered as relevant; such assumption could only be refused in limited cases. There was a strong argument for the CJEU to answer on the referring, otherwise the possibility of holding another referendum in case the unilateral revocation was denied would still be an open question.The basic argument for unilateral revocation is double and simultaneous: first, regarding the importance of the notion "intention" and second emphasis on the sovereign power of decision-making by member-states. Regarding the protection measures against abuse, although it is at least convincing that national constitutional requirements would not always play as a filter, it is better to specify what limitations – probably in the form of rejection to review the notification one or two years after the previous notification or extending the article 50 process where the last process stopped – would be applicable.

Unfortunately, the opinion is unclear regarding the time limitation, especially delivered during negotiation among the EU and the UK, and especially that the AG did not took into account the possibility of extending the deadline (which actually happened, extending it until 31st of October 2019) and how would this affect the unilateral revocation.Would the notification be only possible within a two-year period or, also, during the extension of that period? The opinion is contradictory in parts; the judgment explained below is not. The possibility of delaying the withdrawal agreement deadline, which is not mentioned in the opinion, but mentioned in the judgment, means that the revocation is possible during the extension of that deadline.The revocation with consent could not simply fit in the literal meaning of article 50, since there is no process of approval. Further, since there is no need of consent and approval, it is probably that every member-state would consider the unilateral revocation.

In general, AG's opinion is a support for those proposing unilateral revocation and in favour of the applicants. Regardless of whether it changes the political dynamics, it is less probably that there may be a second referendum with different outcome in favour of those supporting the EU membership.

THE CJEU JUDGMENT IN WIGHTMAN CASE

If we look at the judgment, from the beginning it can be seen that it confirms that the UK may unilaterally revoke the notification of the intention to withdraw from the EU in the most general terms, thus broadly following

the non-binding opinion of AG's Bordona.[33]First, the Court rejects the UK's argument that the matter is hypothetical and supports national courts to refer questions to the CJEU about the EU law.[34]

On the merits, the Court refers that "the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole".[35]As regards the wording of article 50, the Court noted that article 50 does not explicitly address the subject of revocation, neither expressly prohibits nor expressly authorises revocation. But, the Court, as pointed by the AG in his opinion, indicates that article 50 refers to notification of the "intention" to withdraw. "An intention is, by its nature, neither definitive nor irrevocable".[36]

Observing that the withdrawal decision is one-sided in accordance with member-state's constitutional requirements, the Court ruled that „the Member State is not required to take its decision in concert with the other Member States or with the EU institutions. The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice".[37]

As for the objectives of article 50, the Court pursues two objectives: "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".[38]As stated by AG, it further locates the matter on revocation as part of the first of these objectives, thus linking the revocation with the sovereign decision for withdrawal: „the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU 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 a withdrawal agreement concluded between the European Union 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 laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired".[39] As the withdrawal period is extended until 31st of October 2019, it is clear that unilateral right to revoke the notification still exists. AG's opinion on this is

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[33] Case 621/18, *Andy Wightman v Secretary of State for Exiting the European Union*[2018] ECLI:EU:C:2018:999.

[34] Ibid, paragraph 30.

[35] Ibid, paragraph 47.

[36] Ibid, paragraphs 48 and 49.

[37] Ibid, paragraph 50.

[38] Ibid, paragraph 56.

[39] Ibid, paragraph 57

somewhat contrary on this, as it represents a key point since the extension would not be further needed if a second referendum on Brexit occurs.

Another question that raises are the rules applicable on unilateral revocation. Since article 50 is silent, the Court said that same rules are applied for the revocation as those applied in the notification for withdrawal: "it may be decided upon unilaterally, in accordance with the constitutional requirements of the Member State concerned".[40]The Court also confirmed that the revocation would mean that the UK keeps its status as a member-state, as the revocation would reflect "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".[41]The "revocation is fundamentally different in that respect from any request by which the member-state concerned might ask the European Council to extend the two-year period and the Court rejected the analogy that the Commission and the Council seek to make between that revocation and such an extension request.[42]

As regards the article 50 context, the Court emphasized the articles 1 and 2 of the TEU for "ever closer union among the peoples of Europe", EU citizenship and liberty and democracy,[43] and that "the European Union is composed of States which have freely and voluntarily committed themselves to those values", and also "any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States".[44]Therefore, "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", and that would be the case if "Member State could be forced to leave the European Union despite its wish – as expressed through its democratic process in accordance with its constitutional requirements – to reverse its decision to withdraw and, accordingly, to remain a Member of the European Union".[45]

Also, the Court looks at the origins of article 50 when different amendments were 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". Moreover, the Court's findings were corroborated with the VCLT "which was taken into account" when previous version of article 50

[40] Ibid, paragraph 58.
[41] Ibid, paragraph 59.
[42] Ibid, paragraph 61.
[43] Ibid, paragraphs 61 and 62.
[44] Ibid, paragraphs 63 and 64.
[45] Ibid, paragraphs 65 and 66.

was drafted. The Convention indicates that "in clear and unconditional terms that a notification of withdrawal … may be revoked at any time before it takes effect".[46]

Next, the Court rejects the Council's and Commission's argument that the revocation requires unanimous approval by the EC as it "would transform a unilateral sovereign right into a conditional right subject to an approval procedure", and it "would be incompatible with the principle…that a Member State cannot be forced to leave the European Union against its will".[47]

Finally, the Court presents the conditions for revocation:

- the revocation must happen before entering in force the Withdrawal Agreement (or if there is no such agreement, in period of two-years under article 50);

- the revocation must be submitted in writing to the European Council; and

the 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".[48]

CONCLUSION

The CJEU judgment will probably have no impact on the possibility that the Brexit could be reversed. The Wightman judgment, more than the AG's opinion, strongly supports the unilateral revocation of the notification on best possible conditions. The admissibility of the case is not surprising and is related to previous case-law referring to national courts. As the Court said, article 50 makes no reference to the revocation and it does not necessarily have to indicate the resolution of the matter, but it is right when pointed out that there is an explicit reference to the intention to withdraw.

Also, the judgment secured important additional information regarding the Brexit process. The Court accepted the arguments that the notification of intention to withdraw from the EU could unilaterally be revoked by the UK without the consent of other EU member-states. This is important and could strengthen the argument that the UK Government could hold a second referendum with a choice of people's voice to remain in the EU.

The Court's judgment on unilateral revocation of the notification confirms the nature of the first UK decision which was not "approved" or filtered by EU institutions after receipt of the notification. The parallel which

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[46] Ibid, paragraphs 68-71.

[47] Ibid, paragraph 72.

[48] Ibid, paragraphs 73 and 74.

the judgment draws between the notification and the revocation suggest that there can be no review by EU institutions on revocation, since it is confirmed that it meets the minimum requirements set by the Court.

As far as the international law, it is contrary to the usual autonomy of the EU law from international law for which the Court refers to at the outset of the judgment, but the Court justifies it as the drafters of what become article 50 took into account the VCLT.

Finally, on revocation conditions, the written notification is simple: EU institutions could determine whether the revocation is genuine or not and the requirement for "unequivocal and unconditional" revocation suggest that the notification must confirm that the UK has no intention to renegotiate its membership or send another notification shortly after. Implicitly, if the revocation was of these reasons then a legal question will arise on what the EC could do: it might refuse to accept the notification, with the UK challenging the decision; simply to decide to refuse to renegotiate for membership; or to accept the new withdrawal notification if it is followed shortly after the revocation of the first notification.

However, in my opinion, the judgment is somewhat disappointing. It failed to secure significant conditions regarding the crucial question related to revocation of notification from article 50. But, in these condition, the Court makes no mention of the condition noted in AG's opinion that the revocation must be in good faith and sincere cooperation, which is very difficult to apply in practice. This is a useful information, because if the UK change its mind about Brexit and change its decision of withdrawal in accordance with its constitutional requirements and give written notification to the EC for such decision before 31st of October 2019 or later in case the withdrawal day to be extended with another agreement between UK and EU member-states, the UK may remain in the EU under unchanged terms. This is important, as there were suggestions that if UK wishes to remain in the EU it may need the consent of other member-states that may use the UK's weak negotiating position in order to eliminate benefits which the UK currently enjoys.

Also, the Court, unlike the AG, makes no mention of the domestic process that led to the revocation, indicating only that it needs to be in accordance with the UK's constitutional requirements. Overall, the judgment tells us that the Brexit process could be reversed if UK wishes to, but it is irrelevant as long as the Government is not considering such thing. It is not quite certain whether the revocation would require a new referendum under the EU law. The Court's judgment for three times refers to revocation decision through "democratic process", but in the judgment's operational part it refers only to "constitutional requirements". Some might argue that it would be undemocratic

to reverse the Brexit decision without referendum. However, representative democracy is the best form of democratic decision-making. Further, under the UK's constitutional system, the Parliament remains the supreme legislative authority, so if the Parliament decides to change the Brexit decision, such decision must be in accordance with the UK's constitutional requirements.

However, thanks to the CJEU judgment, the UK could take a decision to reverse Brexit until 31st of October 2019, thus remaining in the EU on existing conditions. Still, this is not a useful information, since it is unlikely that the UK will manage to take final decision in the next few months. For one reason, a new referendum takes at least a 22 months organization. This means that even if the UK Government decides to hold a new referendum to reverse Brexit it will require the consent of EU member-states for new extension of the period in order to have time to organize the voting.

The UK Government asked the Court to refuse to rule on ground that the referring question by the Scottish Court was hypothetical since the UK Government gave no indication that it wishes to revoke the notification. Since the CJEU decided to rule it should have tried to give useful directions. Unfortunately, it ended with a decision which applies only in extremely unlikely scenario in which the UK definitely gives up from Brexit by 31st of October 2019 and that gives a little useful direction regarding the key question that preoccupied the Council and the Commission, and that is the potential for abuse of right in order to avoid time limitations imposed by article 50.