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BRIEFING PAPER

Number 8415, 10 December 2018

Brexit questions in national and EU courts

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Summary

Since the EU referendum in June 2016, several questions have been raised in national courts in the UK and other EU Member States and before the Court of Justice of the EU (CJEU) that concern Brexit – some directly, some indirectly. Several have been about the Brexit process in the UK and under Article 50 of the *Treaty on European Union* (TEU); others concern, for example, the implications of Brexit for citizens' rights, UK extradition requests and matters of EU law that could be significant for future EU-UK relations.

Questions about the Brexit process

- the exclusion of long-term expatriates from voting in the EU referendum
- electoral irregularities in the referendum campaign
- the UK Parliament's role in triggering Article 50 TEU (the *Miller* case)
- the legality of the European Commission's ban on Brexit discussions with the UK before the triggering of Article 50 TEU
- the legality of the Brexit negotiations
- the revocability of Article 50 TEU

Other matters

- EU citizenship rights
- the extradition of convicted criminals to the UK under European Arrest Warrants
- EU trademark protection
- dispute settlement mechanisms and the autonomy of EU law

Several of the challenges have been crowdfunded, mostly coordinated by the 'Good Law Project'.

For the most part, the citizens' challenges have not progressed to or been successful at the CJEU, but there have nonetheless been some significant developments in the UK and EU courts.

Some key cases

- The *Miller* case resulted in the UK Parliament enacting legislation to authorise the triggering of Article 50, rather than the Government doing so under prerogative powers.

- In *Miller* it was taken as given that the notification made under Article 50 TEU was irrevocable, and the point was not argued despite its potential significance. But the Inner House (the appellate chamber of the Scottish Court of Session) judgment in Wightman and others, 21 September 2018, meant there would be a ruling from the CJEU. The Court ruled on 10 December on whether the Article 50 notice can be unilaterally revoked by the UK as a matter of EU law. The Advocate General's Opinion on 4 December 2018 was that unilateral revocation was permissible. The CJEU ruled that that unilateral revocation of Article 50 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 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 Co uncil agreement or not).

- The CJEU judgment in RO,18 September 2018, concerns the lawful execution by Member States under EU law of European Arrest Warrants (EAWs) issued by the UK. The CJEU ruled that, all other requirements of the EAW Framework Decision being satisfied, the UK EAWs should continue to be executed in the lead-up to Brexit. The CJEU did not speculate about a transition/implementation period.
- In *Shindler* the General Court dismissed the action as "inadmissible" but the applicants are likely to appeal.
- The CJEU ruling in *Achmea* (dispute settlement) suggests that after Brexit the UK will not be able to avoid the impact of EU law and the CJEU.

More to come?

CJEU President, Professor Koen Lenaerts, believes that many more Brexit cases will come before the CJEU before and after the UK leaves the EU.

1. Introduction

Some questions raised before national and EU courts have been about the Brexit process itself and have sought to clarify legal or constitutional uncertainties about Article 50 of the *Treaty on European Union* (TEU). For example, the High Court and Supreme Court cases of Gina Miller and Deir Tozetti Dos Santos challenged the UK Government's assumed power to trigger Article 50 TEU and start the process of the UK's withdrawal from the European Union. The question as to whether an Article 50 notice of withdrawal can be revoked has been a point of much legal comment since the EU referendum and was referred to the Court of Justice of the EU (CJEU) for a preliminary ruling (see section 3 below).

Other questions have come from UK expatriates, many crowdfunded by the 'Good Law Project',[1] seeking to challenge the UK election rules that meant they could not vote in the referendum in June 2016. UK citizens living overseas are entitled to be registered to vote in UK Parliamentary elections for up to 15 years in the constituency they were registered in before leaving the UK. The franchise for the EU referendum was the parliamentary franchise and overseas voters were therefore able to vote in the referendum, but the fifteen-year rule also applied. This meant that many long-term British residents in other EU countries (estimated at 700,000) could not vote. Commentators believe most of these would have voted to stay in the EU.[2] But with the notable exception of the *Miller* case, "it has proved difficult to use the courts to challenge or clarify key aspects of Brexit".[3]

Questions about the implications of Brexit as they may affect particular areas of EU law have also been raised at the CJEU, so far with regard to citizenship rights ('Amsterdam case'), intra-EU investment (*Achmea*) and extradition (*RO and others*).

The Court's President, Professor Koen Lenaerts, believes many more Brexit-related cases will come before the CJEU. In an interview with the *Financial Times* in November 2016, he said "there were myriad unforeseen legal consequences of sovereign exit from the union that the EU's top court may be called on to resolve".[4] In April 2018 Mr Lenaerts said Brexit-related cases were already mounting up at the CJEU and he repeated his earlier claim that there would be many more

1 Which says it brings "strategic legal cases to change how the law works and to drive demand for further law change"

2 The Overseas Electors Bill 2017-19, a Private Member's Bill sponsored by Glyn Davies MP with Government support seeks to end the 15-year time limit and therefore fulfil a 2017 Conservative manifesto commitment. It had its first reading on 19 July 2017 and its Second Reading on 23 February 2018. For further information on the Bill, see Commons Briefing Paper 8223, Overseas Electors Bill 2017-19, 23 February 2018.

3 Jonathan Rush and Hanna Bates-Martens, Brexit: why court challenges aren't working (yet), Travers Smith, 28 June 2018

4 Financial Times, 'Many ways' Brexit may go to EU courts, top ECJ judge says, 21 November 2016.

"beyond the wildest imagination" of lawyers, and "from the most unexpected angle you could imagine".[5]

In fact, to date there has been only a handful of Brexit-related cases at the EU Court; it remains to be seen whether numbers will increase in coming months. For the most part, the citizens' challenges have not progressed to or been successful at the CJEU, but there have nonetheless been some significant developments in the UK and the EU courts.

[5] Telegraph, Brexit cases are already piling up reveals European Court of Justice boss, 19 April 2018

2. Roles of Government and Parliament in the Brexit process

2.1 The *Miller* case

Gina Miller and Deir Tozetti Dos Santos successfully challenged the Government's position that Article 50 of the *Treaty on European Union* (TEU) could be triggered by royal prerogative.[6] The Supreme Court ruled that it would not be legal for the Government to use prerogative powers to trigger Article 50: instead, primary legislation was required.

Gina Miller's legal argument

The central argument of the Miller case was that the act of giving Article 50 notification would inevitably lead to major changes to UK law, and that such changes could only be made with the authority of primary legislation rather than through the prerogative.

The notification, rather than any subsequent repeal of the *European Communities Act 1972* (ECA), would lead to the EU Treaties no longer applying in domestic law, which would cause statutory rights, ascribed by Parliament, to be lost.

Prerogative powers could not be used to change domestic legal rights conferred by Parliament. Issuing the Article 50 notice would effectively pre-empt the ability of Parliament to decide on whether statutory rights should be changed.

The Government's legal argument

In response, the Government argued that the ECA did not alter or restrict the Government's ability to use the prerogative to conduct foreign affairs.

Further, the Government argued that it could use the Prerogative to trigger Article 50, even if the use of the power would result in a change to statutory rights. If Parliament had wished to remove the Government's ability to use the Prerogative to withdraw from the EU Treaties, it would have done so expressly; Parliament had had multiple opportunities to legislate in such a way but had not done so.

The Courts' rulings

Both the High Court of England and Wales and the UK Supreme Court ruled that the Government's position on the use of the prerogative was not in accordance with requirements of the UK's unwritten constitution. Parliamentary sovereignty necessitates that changes of major constitutional significance to the statute book are subject to parliamentary authorisation.

As a result of the *Miller* ruling the *European Union (Notification of Withdrawal) Bill* was introduced on 26 January 2017. It received Royal

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[6] For information on the Royal Prerogative, see Commons Library Briefing Paper 3861, The Royal Prerogative, 17 August 2017.

Assent on 16 March 2017. This gave the Prime Minister the power to notify the European Council of the UK's intention to withdraw from the EU under Article 50(2) TEU. This notification was given on 29 March 2017, triggering the start of the Brexit process.

Further reading

- Commons Briefing Paper 7702, Brexit reading list: legal and constitutional issues, 20 December 2017
- Section 3.1 of Commons Briefing Paper 7884, European Union (Notification of Withdrawal) Bill, 30 January 2017, explores the arguments in the Miller case and the Supreme Court's conclusions.
- House of Commons Library, Brexit & Miller: what next for Parliament? 24 January 2017
- House of Commons Library, Miller and the Great Repeal Bill, 7 December 2016

2.2 Elizabeth Webster

Elizabeth Webster spearheaded a crowdfunded campaign to halt the Brexit negotiations on the grounds that the Government had not properly consulted Parliament about leaving the EU. She sought a declaration that no decision to withdraw from the EU, for the purposes of Article 50, had been made.

On 12 June 2018, in *R. (on the application of Webster) v Secretary of State for Exiting the European Union*, the High Court dismissed the legal challenge for being out of time and unarguable. Lord Justice Gross said the case was "hopeless" and "totally without merit", and that it was "difficult to conceive of a challenge more detrimental to the conduct of a major issue of national and international importance, whatever political view is taken of the merits or demerits of Brexit".

He concluded that "put bluntly, the debate which [Elizabeth Webster] seeks to promote belongs firmly in the political arena, not the courts", but he said the court did not disparage the motivation of such challenges, given the importance of the rule of law - just that it was "doomed to fail" on its merits.

Nevertheless, the point was made that the substantive decision to leave the EU was not made by Parliament or in the referendum; it was an executive act of the Prime Minister. In the hearing on 12 June the Government asserted that no substantive decision was required to leave the EU – merely the sending of the notification. The exchange was as follows:

> LORD JUSTICE GROSS: -- it's *in vacuo*, isn't it?
>
> MR CROSS [for the Government]: -- between the Act of Notification and an absent decision. It is a distinction without a difference. Ofcourse there was a decision to withdraw and that is what that analysis, my Lord, if your Lordship is putting to me can one properly treat or characterise the decision to notify as evidenced in the letter of notification as a 'decision', leaving

> formalities aside of course the answer to your Lordship is 'yes'. […]
>
> LORD JUSTICE GROSS: So forget Mr Mercer, forget formality, from what do I reduce the decision to withdraw?
>
> MR CROSS: Unquestionably the notification is a decision to withdraw.[7]

The point made it into the judgment as follows (emphasis added):

> The legislation was intended to give effect to the decision in Miller. Its **authorisation to the Prime Minister** to notify under Art.50(2), plainly contemplated and encompassed the power to take a decision to withdraw and **conferred that power expressly on the Prime Minister**; there would indeed be no point in notifying under Art.50(2), absent a decision to withdraw under Art.50(1).[8]

Further reading

- CrowdJustice website, Article 50 Challenge, Liz Webster
- UK Constitutional Law Association, New Article 50 Case Resoundingly Rejected by the Divisional Court, Robert Craig, 26 June 2018
- Monckton Chambers, Article 50 decision validly taken: new judgment, Jack Williams, 20 June 2018
- Financial Times, 'Hopeless': UK High Court dismisses crowdfunded challenge to legality of Brexit, 12 June 2018
- Independent, Brexit: Government facing High Court challenge to cancel Article 50, 22 December 2017

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7 Transcript, *R. (on the application of Webster) v Secretary of State for Exiting the European Union*, 12 June 2018

8 Judgment in *R. (on the application of Webster) v Secretary of State for Exiting the European Union*, para. 13

3. The revocability of Article 50

The question about whether Article 50 TEU can be revoked is relevant in the context of a political situation in which the UK Government or Parliament or the electorate – or a combination depending on the circumstances - decides against leaving the EU. Although the Government has ruled out seeking to revoke Article 50, opponents of Brexit in Parliament, the population and the expat community have clung to the possibility that a turn of events might give the question salience. It has been the subject of considerable debate.

3.1 What Article 50 says

Article 50 TEU sets out three possible ways to determine when the EU Treaties will stop applying to the UK:

- The date of entry into force of a withdrawal agreement;
- "failing that, two years after the notification";
- or at some other date if the European Council and UK unanimously agree to extend the two-year period.

Article 50 TEU is silent on the matter of whether it can be revoked. Academic opinion tends towards the conclusion that notification could be revoked before Brexit day,[9] but there have been some authoritative views to the contrary.[10] The question gives rise to others such as whether Article 50 could be revoked unilaterally or whether the EU would have to permit the UK to leave; and whether, if revoked, the UK would remain an EU Member State on its existing terms (with opt-ins, opt-outs, budget rebate etc) or whether the EU might stipulate conditions.

The UK Supreme Court did not address the matter in the *Miller* judgment because both parties had agreed in the High Court to assume that the notice was irrevocable, although many argued at the time that, as a court of last resort, it was the Supreme Court's duty to refer the issue to the CJEU pursuant to Article 267(3)TFEU.[11]

The UK Government has not argued that Article 50 cannot be withdrawn; rather that it would not be Government policy to withdraw it.[12]

There are no judicial precedents to guide CJEU interpretation of Article 50 and it is not clear whether recourse could be made to the Vienna

9 See, for example, UK Constitutional Law Association webpages on revocability issues.

10 See, for example, the March 2018 Report produced for the EP's AFCO Committee, Verfassungsblog, Miller, Brexit and the (maybe not to so evil) Court of Justice, Daniel Sarmiento, 8 November 2016.

11 See, for example, Peers, Syrpis, Sanchez-Graells, Sarmiento.

12 See, for example, Lord Bridges of Headley: "regardless of the legal position, we do not intend to revoke our notice to withdraw", HL Deb 20 March 2017, c 8. David Davis told the Exiting the EU Committee in December 2016, "We don't intend to revoke it. It may not be revocable. We don't know".

Convention on the Law of Treaties (VCLT), under which a notification of intention to withdraw from a treaty "may be revoked at any time before it takes effect" (Article 68). This provision does not override any specific arrangements in a treaty.

3.2 The Dublin case

The 'Good Law Project', headed by Jolyon [Jo] Maugham QC, sought to establish via the High Court of Ireland whether the UK Parliament could reverse the decision to leave the EU. The case, which was largely crowdfunded, sought a referral to the CJEU on the question of whether Article 50, once triggered, could be unilaterally revoked by the Government or whether this would need the consent of the other 27 EU Member States.

The plenary summons was filed with the Irish High Court in March 2017. However, on 30 May 2017 Jo Maugham announced that he and the other Plaintiffs, Jonathan Bartley, Keith Taylor and Steven Agnew, had "taken stock of progress made on the Dublin case, its prospects going forward and changes in the wider political setting", and decided "with regret" that the litigation should be discontinued. He set out their reasons in the announcement.

3.3 Wightman and Others

Petition seeking clarification

Some remain campaigners have tried to bring national cases that would oblige the Government to seek clarification from the CJEU on the interpretation of Article 50 and challenge its assumption that the Article 50 process means Brexit cannot be stopped. A petition was lodged on 19 December 2017 seeking judicial review of the UK Government's position on the revocability of a notice of intention to withdraw from the EU under Article 50 TEU.

In February 2018 a cross-party group of MSPs (from the Labour party, SNP, Liberal Democrats and Scottish Greens), MEPs and MPs,[13] supported by the Good Law Project, were granted permission for judicial review into whether the UK could unilaterally revoke Article 50.

Lord Doherty's Opinion

In his Opinion at the Court of Session in Edinburgh, 6 February 2018, Lord Doherty concluded that he was "not satisfied that the application has a real prospect of success" and refused permission to proceed.[14] Another hearing was scheduled for 21 February, when three judges heard a challenge to Lord Doherty's ruling.

Lord Carloway commits to full hearing

[13] Andrew Wightman MSP, Ross Greer MSP, Alyn Smith MEP, David Martin MEP, Catherine Stihler MEP, Christine Jardine MP, Joanna Cherry QC MP.

[14] See BBC News, Judge rejects bid for review over Article 50 withdrawal case, 6 February 2018

On 20 March 2018 at the Court of Session the panel headed by Lord Carloway overturned the earlier ruling, saying there were "significant problems"; the Government's position was "ambiguous"; and there should be a full hearing so all the arguments could be debated. He concluded: "The issue of whether it is legally possible to revoke the notice of withdrawal is, as already stated, one of great importance".

There was a procedural hearing on 1 May 2018 and a substantive hearing on 22 May at which the Court of Session gave a decision on whether to ask the CJEU for a ruling on Article 50 revocability. Aidan O'Neill QC, for the defendants, argued that there was a clear and urgent need for the Court to refer the case to the CJEU because MPs were about to start voting on the EU (Withdrawal) bill. David Johnston QC for the UK Government maintained MPs had no constitutional right to ask a court to interfere in a political decision at Westminster.

Lord Boyd refuses the petition

On 8 June Lord Boyd decided not to ask the CJEU if Parliament could unilaterally withdraw the Article 50 notification because, as things stood, the Government did not intend to withdraw it, so the CJEU would be deciding a "hypothetical question" and the conditions for a reference had not been met.[15]

Lord Boyd considered the role of Parliament and the courts (para. 58):

> It is of course true that the court is not being asked to rule on the validity of an Act of either the UK Parliament or Scottish Parliament. It is however being asked to settle a legal question raised by a number of MPs in the course of the legislative process. The petitioners seek judicial support for the option of the UK remaining in the European Union to be considered by Parliament. In my opinion that is a clear and dangerous encroachment on the sovereignty of Parliament. It is for Parliament itself to determine what options it considers in the process of withdrawing from the European Union. It is for Parliament to determine what advice, if any, it requires in the course of the legislative process.

The petitioners appealed this decision.

Box 1: The relevance of the petition to the *EU (Withdrawal) Act 2018*

Under section 13 of the *European Union (Withdrawal) Act 2018* the withdrawal agreement can only be ratified if it has been approved by a resolution of the House of Commons and been debated in the House of Lords. If it is not approved, the Government must state how it intends to proceed.

If the Prime Minister states before 21 January 2019 that no agreement in principle can be reached, the Government must again state how it proposes to proceed and must bring that proposal before both Houses.

The petitioners sought a ruling on whether there was another legally valid option – to revoke the Article 50 notice and allow the UK to remain in the EU. They argued that the issue was directly relevant to the EUW Act parliamentary votes and that "If a decision to remain was available as a matter of EU law, the

[15] Courts typically do not answer hypothetical questions and the CJEU has stated this principle in Gauweiler and others (Case C-62/14, paras. 24 and 25).

UK Parliament could pursue that option irrespective of Government policy" (para 11 of Scottish Court ruling, 21 September 2018).

Lord Carloway decides to ask the CJEU

On 21 September at the Inner House (the appellate chamber of the Scottish Court of Session) Lord Carloway, sitting with Lord Menzies and Lord Drummond Young, said that revoking Article 50 was a decision for Parliament, not the UK Government. He decided to seek a preliminary ruling from the CJEU under Article 267 TFEU as to whether the UK could unilaterally revoke its decision to leave the EU, requesting an expedited procedure[16] because of the "urgency of the issue".

Important points in Lord Carloway's opinion were:

- matters had "moved on" since Lord Boyd's ruling and it was "clear" that under section 13 of the EUW Act Parliament would be required to vote on any Brexit deal;
- the question was not "hypothetical: "It seems neither academic nor premature to ask whether it is legally competent to revoke the notification and thus to remain in the EU";
- "the matter is uncertain in that it is the subject of a dispute; as this litigation perhaps demonstrates. The answer will have the effect of clarifying the options open to MPs in the lead up to what is now an inevitable vote. On that basis the petition is competent at least at the instance of an MP" (para. 6);
- the courts existed "as one of the three pillars of the state to provide rulings on what the law is and how it should be applied" (para. 21) and the question raised by the petitioners was both practical and competent;
- the answer to the revocability question would "have the effect of clarifying the options open to MPs in the lead up to what is now an inevitable vote" (para. 27);
- the CJEU would not be advising Parliament on "what it must or ought to do", but "merely declaring the law as part of its central function" (para. 28), and "how Parliament chooses to react to that declarator is entirely a matter for that institution" (para. 28).

Petitioner Jo Maugham tweeted "It is no exaggeration to say this is a case that could decide the fate of the nation". He commented in *The Guardian*:

> There is no reason to believe the other 27 member states would, even at this late stage, block us from remaining. Indeed, there

[16] Under Article 105 of the CJEU Rules of Procedure, the referring court or tribunal can ask the President of the CJEU to use an expedited procedure "where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General".

> have been a number of high-level indications that the UK can change its mind. But there are still vital questions left unanswered.[17]

Question for the CJEU

In their draft reference to the CJEU, the petitioners asked:

> Where 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 EU?

The Scottish Court directed the parties to provide submissions on the draft reference in writing within 14 days, before sending it to the CJEU. The Court will consider the CJEU's advice before issuing a final ruling.

Wightman and Others (Case C-621/18) was lodged with the CJEU on 3 October with a request for the accelerated procedure, which was granted on 5 October. The hearing is scheduled for 9 am on 27 November 2018 and the Good Law Project website says it is "expecting a decision before Christmas".[18] The Good Law Project has posted the terms of the reference here.

Professor Kenneth Armstrong considered the possibility that the UK Government might object to the reference and the CJEU might reject it.[19]

UK Government appeals

The Government applied for permission to appeal to the Supreme Court on 16 October 2018. The Government's position was that the petitioners' questions were inadmissible on the basis that the CJEU has long refused (a) to answer hypothetical questions; or (b) to provide advisory opinions.

On 8 November 2018 the Inner House of the Court of Session in Scotland refused permission to appeal to Supreme Court.

The Secretary of State for Exiting the EU applied to the Supreme Court for permission to appeal, but its request was rejected by the Supreme Court on 20 November 2018. The Government was reported to be "disappointed" by the decision and was giving it "careful consideration".

The full text of the Supreme Court's order, including the reasons for this decision, can be found via the following links:

- Permission to appeal determination, 20 November 2018, Lady Hale, Lord Reed, Lord Hodge, 20 November 2018

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17 Today's ruling shows the triggering of article 50 can be reversed, 21 September 2018

18 Good Law Project, 4 October

19 Kenneth Armstrong, Can An Article 50 Withdrawal Notice be Revoked? The CJEU is Asked to Decide, *Verfassungsblog*, 8 October 2018

- In the matter of Secretary of State for Exiting the European Union (Appellant) v Wightman and others (Respondents), 20 November 2018 - Court order

DExEU outlined the Government's arguments:

> The United Kingdom Government contests the justiciability of these Questions, which amount on any view to a request for an "advisory opinion", before the Courts in the United Kingdom on the basis that (a) they are hypothetical and (b) breach established constitutional principles of respect between Parliament and the Courts; and as a consequence, argues that the Questions should never have been put to the CJEU.
>
> The Questions referred to the CJEU are hypothetical because the United Kingdom Government does not intend to revoke the Notice it has given (following the passing of the European Union (Notification of Withdrawal) Act 2017 by Parliament) and revocation is not in any sense meaningfully in prospect. No legislation is challenged and no rights are said to be adversely affected. The Questions are sought to be answered for the purposes of political debate. The Questions would in any event fall to be answered by the CJEU at the inter-state or EU institutional level in the light of the reaction of the remaining EU Member States (EU27) and the reaction of the EU27 and the EU institutions to any imagined revocation is unknown.
>
> Also, as the questions posed are designed to influence the terms of a debate yet to be had in Parliament, considerations of Parliamentary Privilege and Parliamentary Sovereignty act as a complete and jurisdictional bar to any adjudication by the Court. If an advisory opinion is justified in this case, it would turn any subject being debated in Parliament into a topic for immediate and pre-legislative adjudication. It is impossible to identify a criterion against which to determine what would and would not be justiciable without the Courts entering the political arena. Further, the reference seeks an outcome that is not permissible under EU law. The Treaty on the Functioning of the European Union provides the means by which Member States and EU Institutions can raise before the CJEU issues about the rights and obligations of Member States under the Treaties, including disputes under Article 50. The reference is either designed or will operate to circumvent the clear limits of CJEU competence so that the answer can influence the domestic politics of a Member State.[20]

In paragraph 38 of the Application for Permission to Appeal, the Government acknowledged that Parliament can direct it to revoke the Article 50 notice:

> For the issue of revocability of the Notice to become live, Parliament must first have directed the Government, against the Government's settled policy and against the popular answer provided by the Referendum, unilaterally to revoke the Notice.[21]

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20 DExEU, Wightman and Others v Secretary of State for Exiting the European Union - application for permission to appeal to the Supreme Court, 26 November 2018

21 ANNEX 1 to FORM 1, 5. Information about the decision being appealed

Is primary legislation required to authorise a revocation?

Even if an Article 50 notification can, in principle, be revoked unilaterally by the UK, there remains the question of what the domestic constitutional requirements would be for it to do so.

Robert Craig of LSE and Durham Law Schools, has argued, for instance, that fresh primary legislation would be required to authorise any Government minister to purport to "revoke" a notification under Article 50.[22] He argues that the wording of the *EU (Notification of Withdrawal) Act 2017* affirms expressly Parliament's intent that a notification should be given, and that revocation without further Parliamentary authorisation would frustrate the will of Parliament and therefore be an unlawful exercise of the Royal prerogative.

The expedited procedure

The expedited procedure "essentially consists of shortening the different steps of the normal preliminary procedure without dispensing with any of them".[23] According to the authors "[i]n 2008 the average time for deciding a case under the procedure was 4.5 months whereas the average time for all preliminary references was 16.8 months".[24] Koen Lenaerts, Ignace Maselis and Kathleen Gutman conclude that "In practice, where an application for the expedited procedure is accepted, the Court of Justice and the General Court generally reach a final decision within an average period of three to nine months".[25] In *Wightman* it will have been 11.5 weeks from the request for an expedited procedure on 21 September to the ruling on 10 December.

CJEU hearing

The Petitioners

The case was heard by the full court of judges at the CJEU on 27 November 2018. Lawyers for the petitioners 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

The UK Government argued that the case should not be permissible as it was a hypothetical question (it did not intend to revoke Article 50) and any ruling would be used to shape domestic political debate in the UK.

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22 Robert Craig, Why an Act of Parliament Would Be Required to Revoke Notification under Article 50, U.K. Const. L. Blog, 16 October 2017

23 Morten Broberg and Niels Fenger, Preliminary References to the European Court of Justice, Second Edition, 2014, p.396

24 Recent CJEU annual reports do not include figures for the duration of expedited procedures; only of urgent procedures in Justice and Home Affairs matters – for which the average time taken was 2.9 months; see page 38 of 2017 annual report.

25 EU Procedural Law, Oxford University Press, 2014, p.838

European Commission and Council

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 then revoke unilaterally. It argued that as the extension of Article 50 required unanimity in the European Council, so should revocation. The Court said it would issue an opinion and decision on this very quickly.

Advocate General's Opinion

On 4 December 2018 the Spanish Advocate General Campos Sánchez-Bordona issued his Opinion in in the Wightman case.[26]

The Advocate General agreed with the petitioners that when a Member State has notified the European Council of its intention to withdraw from the EU, Article 50 TEU allows the unilateral revocation of that notification up until the point when a withdrawal agreement is concluded, provided that the revocation has been decided in accordance with that Member State's constitutional requirements, formally notified to the Council. A-G Sánchez-Bordona rejected the argument of the Council and Commission that the EU27 Member States would have to agree unanimously for there to be a valid revocation of an intention to withdraw.

The Advocate General also rejected the UK Government's position that the CJEU should decline to answer the question referred to it by the Scottish Court of Session for a preliminary ruling on the interpretation of Article 50. The UK's argument that the issue was hypothetical and theoretical was rejected. The Opinion says the practical consequences of the case are "undeniable"; that a decision by the UK to remain in the EU "in the face of an unsatisfactory Brexit" is a valid option in EU law and the case will clarify options for MPs when they vote.

The AG also concluded that revocation was subject to certain conditions:

- that the notification of revocation must be carried out by means of a formal act of the Member state addressed to the European Council;
- that such a revocation must be made respecting national constitutional requirements;
- that the Member state would be expected to explain its reasons for changing its position;

[26] See also Court press release, 4 December 2018.

- that the revocation must be made before the expiry of the negotiation period covered by Article 50 itself (i.e. revocation could not happen after exit formally happened); and
- that any revocation is to be made subject to the principles of good faith (a general principle of international law) and sincere cooperation (an EU principle).

Such opinions are not binding on the CJEU and it is possible that the Court could decide contrary to the A-G's Opinion (although decisions are normally in agreement with the opinion).

The CJEU announced that it would issue its judgment at 9am on 10 December, just a day before the scheduled 'meaningful vote' on the withdrawal agreement.

On 10 December 2018, the CJEU 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 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.

The Wightman ruling is discussed in Library Briefing Paper 8461, Brexit: Article 50 TEU at the CJEU, 10 December 2018.

Further reading

- UK Constitutional Law Association, Wightman: What Would Be the UK's Constitutional Requirements to Revoke Article 50? Gavin Phillipson and Alison L. Young:
- Monckton Chambers, Wightman AG opinion, Anneli Howard, 5 December 2018
- Brick Court Chambers, Brexit Law. EU Advocate General says UK's Article 50 notice of intention to leave EU can be unilaterally revoked, Maya Lester QC, 4 December 2018
- EU Law Analysis, Scotching Brexit? Background to the Wightman case about reversing the Article 50 notification unilaterally, Alan S. Reid, Senior Lecturer in Law, Sheffield Hallam University, 16 November 2018
- Kenneth Armstrong, Can An Article 50 Withdrawal Notice be Revoked? The CJEU is Asked to Decide, *Verfassungsblog*, 8 October 2018

- European Law Blog, Can the United Kingdom unilaterally revoke its Article 50 notification to withdraw from the EU? Wightman v Secretary of State for DExEU [2018] CSIH 62, Oliver Garner, 24 September 2018
- Opinion of Lord Carloway, the Lord President, in the reclaiming motion by Andy Wightman MSP and Others against Secretary of State for Exiting the EU, 21 September 2018
- Brexit, the Revocation of Article 50, and the Path Not Taken: Wightman and Others for Judicial Review against the Secretary of State for Exiting the European Union, accepted manuscript submitted to Edinburgh University Press for volume 22, issue 3 (September 2018), pp. 417-422 of the Edinburgh Law Review, Robert Brett Taylor and Adelyn L. M. Wilson (University of Aberdeen School of Law)
- Constitutional Law Association, Kenneth Campbell QC: Wightman v Secretary of State: Article 50 and Parliamentary Privilege, 22 June 2018
- Monckton Chambers, MPs' arguments on revocability of Article 50 notice – petition refused by Court of Session in Edinburgh, 21 June 2018
- Obiterj blog, Court of Session (Outer House) ~ Unilateral revocation of Art 50 notice, 7 February 2018
- EU Law Analysis, Can an Article 50 notice of withdrawal from the EU be unilaterally revoked? Professor Steve Peers, 16 January 2018
- Legal opinion of Jessica Simor QC (Matrix Chambers), Marie Demetriou QC (Brick Court Chambers) and Tim Ward QC (Monckton Chambers), 23 November 2017
- Commons Briefing Paper 7763, Brexit and the EU Court, 14 November 2017

4. UK referendum rules and validity of EU referendum

4.1 Harry Shindler

Shindler at the High Court

British citizens Harry Shindler, who has lived in Italy since 1982, and Jacquelyn MacLennan, who has lived in Brussels since 1987, were excluded from voting in the EU referendum under UK electoral rules. They took a case to the High Court challenging the legality of the franchise for the referendum under the *European Union Referendum Act 2015*.

British citizens living overseas are entitled to be registered to vote in UK parliamentary elections for up to 15 years in the constituency they were registered in before leaving the UK.[27] This was also the franchise rule for the EU referendum. But it is estimated that the 15-year rule could have affected around 700,000 British expats living in the EU, the majority of whom would probably have voted to stay in the EU.[28]

The High Court judgment on 28 April 2016 rejected the claim. Shindler and MacLennan sought leave to appeal to the Supreme Court; this application was heard on 9 May 2016 and leave to appeal was refused by the Court in a judgment on 20 May 2016.

On 24 May 2016 the Supreme Court refused Shindler and MacLennan's application for permission to appeal the Court of Appeal's judgment.

Shindler at the CJEU

Mr Shindler and 12 others took a complaint to the CJEU on 21 July 2017 in *Shindler and Others v Council* (Case T-458/17), in which they challenged the decision by EU27 governments to open Brexit talks with the UK. They claimed that the General Court should:

> … annul Council Decision (EU, Euratom) XT 21016/17 of 22 May 2017, together with the annex XT 21016/17, ADD 1 REV 2 to that decision, authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for that Member State's withdrawal from the European Union.

The EU's General Court heard the appeal on 5 July 2018. The Court released a report in French for the purposes of the hearing, setting out the background to the case. The case lawyer, Julien Fouchet, is "keeping his fingers crossed for a good result, allowing a further

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27 For information on election rules for overseas voters, see Commons Briefing Paper 5923, Overseas voters, 1 March 2018.

28 A poll by Angloinfo of 2,800 expats in April 2016 suggested 75% of UK expats wanted to stay in the EU.

hearing later in the year. However, he said he may have to wait until around September or October before he knows".[29]

CJEU Judgment

The General Court ruled in *Shindler* on 26 November 2018. The Court noted that:

> although the decision of the Council authorising the opening of the Brexit negotiations has legal effects as regards the relations between the EU and its Member States and between the EU institutions, in particular the Commission, which is authorised by that decision to open negotiations for an agreement with the UK, **it does not directly affect the legal situation of the applicants.** [emphasis added]

The General Court dismissed the action as "inadmissible since the decision of the Council authorising the opening of negotiations on Brexit does not produce binding legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position".[30]

The judgment could still be appealed to the full Court of Justice. Julien Fouchet tweeted that he intends to appeal.

Further reading

- EU Law Analysis, How to protect the rights of UK citizens in the EU27 after Brexit? Analysis of the Shindler judgment, 26 November 2018, Professor Steve Peers, University of Essex
- The People's Challenge blog, Harry Shindler at the General Court of the EU, Robert Pigney, 10 July 2018
- The Connexion, French news and views, Avocat Fouchet 'optimistic' after Brexit hearing, 5 July 2018
- Steve Peers' legal analysis of the arguments, Twitter, 2 July 2018
- The People's Challenge blog, Is the withdrawal procedure followed by the UK and the EU legal? Grahame Pigney, 18 June
- The Law Society Gazette, More Brexit cases before the CJEU, Jonathan Goldsmith, May 2018
- Overseas Electors Bill, second reading, 23 February 2018

4.2 Irregularities in referendum campaigns

'Good Law Project' challenge

The Good Law Project, led by Jolyon Maugham QC, issued proceedings in October 2017 challenging the failure of the Electoral Commission to properly regulate the EU referendum.

After the issue of proceedings the Electoral Commission announced it would carry out an investigation, which found that Vote Leave and

[29] The Connexion, Avocat Fouchet 'optimistic' after Brexit hearing, 5 July 2018
[30] General Court press release No 184/18, 26 November 2018

BeLeave campaigner Darren Grimes had breached the electoral rules. The Commission concluded:

- All Mr Grimes' and BeLeave's spending on referendum campaigning was incurred under a common plan with Vote Leave. Vote Leave should have declared the amount of joint spending in its referendum spending return and therefore failed to deliver a complete campaign spending return.
- Vote Leave's referendum spending was £7,449,079.34, exceeding its statutory spending limit of £7 million.
- Vote Leave's spending return was inaccurate in respect of 43 items of spending, totalling £236,501.44. Eight payments of over £200 in Vote Leave's return did not have an invoice or receipt with them. These payments came to £12,849.99.
- As an unregistered campaigner, BeLeave exceeded its spending limit of £10,000 by more than £666,000.
- Mr Grimes delivered an inaccurate and incomplete spending return in his capacity as an individual campaigner.
- Veterans for Britain's inaccurately reported a donation it received from Vote Leave.
- Vote Leave failed to comply with an investigation notice issued by the Commission.[31]

They were fined and referred to the police for possible criminal prosecution.[32]

The separate issue of whether the Electoral Commission had "got the law wrong" continued to a full hearing. The Good Law Project argued that a party in an election or referendum should not be allowed to get around the spending limit by paying for referendum expenses which were donated to another group campaigning for the same outcome without declaring this payment. The Electoral Commission and Vote Leave disagreed.

Electoral Commission 'got the law wrong'

On 14 September 2018, in *R (on the application of the Good Law Project) v Electoral Commission* (Case No: CO/4908/2017), the Divisional Court found that the Electoral Commission had had misunderstood the law; that it was not permitted under election rules for Vote Leave to have donated services (or cash with conditions) without declaring them as a "referendum expense" in their return. The Court concluded:

> … the Electoral Commission has misinterpreted the definition of "referendum expenses" in section 111(2) of PPERA [Political Parties, Elections and Referendums Act 2000]. The source of its error is a mistaken assumption that an individual or body which

[31] Electoral Commission, Vote Leave fined and referred to the police for breaking electoral law, 17 July 2018

[32] See Electoral Commission, ibid; Guardian, Darren Grimes: the pro-Brexit student activist fined £20k, 17 July 2018, and BBC News, Brexit campaigner Darren Grimes raising funds to appeal against fine, 25 July 2018.

> makes a donation to a permitted participant cannot thereby incur referendum expenses. As a result of this error, the Electoral Commission has interpreted the definition in a way that is inconsistent with both the language and the purpose of the legislation.

The Electoral Commission has said it will review the implications of the court ruling on how to interpret political finance laws.[33]

Further reading

- Good Law Project, Another defeat for the Electoral Commission, 4 October 2018
- New Law Journal, Election expenses under scrutiny, 29 March 2018
- Blackstone Chambers, Good Law Project v Electoral Commission, 23 March 2018

A case against the Democratic Unionist Party?

The Good Law Project and Ben Bradshaw MP have taken the first formal steps towards judicial review proceedings in the form of a pre-action letter against the Electoral Commission over its failure to investigate the Constitutional Research Council's (CRC) alleged £435,000 donation to the DUP. They are concerned as to whether the donor directed how the money was spent on advertising in the run-up to the 2016 referendum.

Jo Maugham, who led the Vote Leave/BeLeave legal challenge (see above), has also crowdfunded for a possible legal challenge against the conduct of the DUP and CRC. The Electoral Commission had previously said there was insufficient evidence to open an investigation.[34]

Further reading

- Good Law Project and Jolyon Maugham, Another defeat for the Electoral Commission, 4 October 2018; An existential threat to the DUP, 5 October 2018
- The Electoral Commission, Conclusion of assessments into allegations regarding certain EU Referendum campaigners, 3 Aug 2018
- The Guardian, Electoral Commission drops investigation into DUP over Brexit spending, 2 August 2018
- Channel 4 News FactCheck, Vote Leave's "dark" Brexit ads, 27 July 2018

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33 Financial Times, Brexiters face fresh scrutiny over EU referendum spending, 19 September 2018

34 See BBC, No probe into BBC Spotlight's DUP 'dark money' claims, 2 August 2018; Irish Times, Electoral commission drops DUP Brexit funding inquiry, 2 August 2018.

Susan Wilson and Others

Susan Wilson, chair of Bremain in Spain, headed a crowdfunded challenge in the High Court by the 'UK in EU Challenge' group, which represents British nationals living in France, Italy and Spain. The claim was filed on 13 August 2018.

They argued that the Electoral Commission's findings of irregularities in the BeLeave and Vote Leave campaigns (see above) mean the 2016 EU referendum was not a lawful, fair or free vote. They maintained that:

- the Referendum result is invalid because of the illegal practice of the Leave campaign (as proven beyond reasonable doubt by the Electoral Commission), and
- the Referendum result cannot be relied upon to be the "will of the people" because voters were influenced by the Leave campaign's fraudulent behaviour.

The Government published its Summary Grounds of Resistance on 31 August 2018. The Claimants' reply was published on 7 September along with the Claimants' request for further information. The claimants have published the Judge's decision refusing permission for judicial review, 21 September 2018. Their Notice of Renewal, 28 September, outlines their grounds for reconsideration of the refusal.

Further reading

- UK in EU Challenge website
- Guardian, British expats in EU launch Brexit legal challenge, 14 August 2018
- Electoral Commission statement on High Court ruling, 14 September 2018
- Electoral Commission, Report of an investigation in respect of Vote Leave Limited, Mr Darren Grimes, BeLeave, Veterans for Britain. Concerning campaign funding and spending for the 2016 referendum on the UK's membership of the EU, 17 July 2018

5. EU procedure infringed EU Treaties?

'Fair deal for Expats'

In Case T-713/16 'Fair Deal for Expats', a group established in Lauzun (France), and other applicants who lived in Lauzun and Agnac, challenged the legality of the EU's policy of 'No negotiation without notification' which sought to prevent bilateral contacts between the UK Government and the other Member State governments and the EU institutions until the UK Government had formally notified the European Council of its intention to leave the EU.

The group sought an action for annulment of:

i. The letter of the President of the European Commission, Jean Claude Juncker, of 28 June 2016, sent to the Members of the College of Commissioners and the Directors-General of the Commission after the June referendum, giving the instruction not to negotiate with the United Kingdom before receipt of the Article 50 notification;

ii. Mr Juncker's speech to the EP on 28 June, in which he referred to this order:

> "I have forbidden Commissioners from holding discussions with representatives from the British Government — by Presidential order, which is not my style. I have told all the Directors-General that there cannot be any prior discussions with British representatives. No notification, no negotiation".

'Fair Deal for Expats' pleaded that Mr Juncker lacked competence to adopt these measures, that they infringed the EU Treaties and were in contravention of the "principle of sincere cooperation that the Commission is required to abide by", and that it was a misuse of powers to adopt the measures. They also argued that the ban was unlawful and harmful to the rights and interests of all EU citizens, "especially those UK citizens who have made their lives or business in other EU countries, or EU citizens who have migrated to the UK".[35] The application was made by Croft Solicitors,[36] and Patrick Green QC, Henry Warwick and Matthieu Gregoire of Henderson Chambers.

The European Commission claimed that Mr Juncker's statement had been mistranslated, that his use of the phrase "presidential order" was just a loose figure of speech and that his comments were only intended to bind Commission officials, not other EU Member State governments.

The applicants decided to discontinue their action for annulment and the application was withdrawn in January 2017. 'Fair Deal for Expats'

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35 CrowdJustice, Stand up to President Juncker's unlawful ban on Brexit talks, John Shaw,

36 As for 'Susan Wilson and others'

and the other applicants were ordered to pay their own costs and those incurred by the European Commission.

6. EU citizenship rights: the 'Amsterdam case'

Amsterdam District Court

Five UK nationals living in the Netherlands and supported by expat groups the Commercial Anglo Dutch Society and Brexpats – hear our voice (BHOV) took a case to the Amsterdam District Court, arguing that their EU citizenship should not be removed after the UK leaves the EU.

The District Court said it would refer the case to the CJEU and on 7 February 2018 decided to ask the CJEU two questions (translation):

- Does the withdrawal of the United Kingdom from the EU automatically lead to the loss of EU citizenship of [United Kingdom] nationals and thus to the elimination of rights and freedoms deriving from EU citizenship, if and in so far as the negotiations between the European Council and the United Kingdom are not otherwise agreed?
- If the answer to the first question is in the negative, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship?

On 20 February 2018 Judge Bakels granted the State and the Municipality permission to appeal to the Court of Appeal against his earlier ruling.

In April The Dutch Government appealed the decision to refer the question to the CJEU. Lawyer Erik Pijnacker Hordijk, representing the Dutch Government, told the Court of Appeal on 19 April that the applicants' case was "groundless" and should be ruled as "inadmissible".[37]

Court of Appeal decides not to refer to CJEU

On 19 June 2018 the Court of Appeal decided not to refer the case to the CJEU, upholding the view of the Dutch Government and the City of Amsterdam that the case was "insufficiently concrete", concerned hypothetical future situations rather than a real dispute, and that it was inappropriate given that negotiations between the EU and the UK were still ongoing.

But the Court of Appeal agreed with the District Court that Brexit created insecurity for many British citizens and that ultimately it was up to the CJEU to decide whether Britons would continue to benefit from the rights derived from their EU citizenship. The Court of Appeal also said it was questionable whether Brexit would result in Britons automatically losing their freedom of movement and residence rights.[38]

Further reading

[37] Europe Breaking News, Dutch state appeals expats Brexit case, 19 April 2018
[38] For a discussion of citizenship rights, see Commons Briefing Paper 8635, Brexit and European Citizenship 6 July 2018

- Bureau Brandeis, Brits remain in limbo about EU citizenship post-Brexit, Christiaan Alberdingk Thijm, 19 June 2018
- EU Law Analysis, UK nationals and EU citizenship: References to the European Court of Justice and the February 2018 decisions of the District Court, Amsterdam, Professor Anthony Arnull, 28 March 2018
- European Law Blog, Does Member State withdrawal from the European Union extinguish EU citizenship? C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam ('The Amsterdam Case'), Oliver Garner, 19 February 2018
- Bureau Brandeis blog, Update – Brexit case in the Netherlands, Christiaan Alberdingk Thijm, 30 Jan 2018:
  - memorandum of pleadings
  - writ of summons
  - unofficial translation of ruling

7. Extradition to UK using European Arrest Warrant

Some individuals who are the subject of European Arrest Warrants (EAWs) by the British and Northern Irish authorities have sought to challenge their extradition from the Republic of Ireland. The CJEU has pointed out that in addition to RO (see below), "there are another eight cases in which individuals remain in custody in Ireland solely on the basis of EAWs issued by the United Kingdom and where 'a Brexit point' has been raised as a basis for submitting that the Court should not order surrender".[39] Another estimate suggests that "[a]s many as 20 people, wanted for trial or absconding from the sentences, are understood to have used a similar argument to resist removal from Ireland to Britain".[40]

M.A, S.A. & A.Z.

The High Court in Ireland has requested a preliminary ruling under Article 267 TFEU on an asylum and fundamental rights case (Case C-661/17).

This case involves the transfer of asylum seekers M.A., S.A., and A.Z. from Ireland to the UK. The asylum seekers invoked Brexit - the EAW issued by the UK was challenged because the sentence given would continue past the 29 March 2019 Brexit deadline. The Irish Court asked in a preliminary reference to the CJEU whether:

> … a national decision-maker, in considering any issues arising in relation to the discretion under art. 17 [of the Dublin III Regulation] and/or any issues of protection of fundamental rights in the UK, required to disregard circumstances as they stand at the time of such consideration in relation to the proposed withdrawal of the UK from the EU?

On 20 December 2017 the Irish Court's request for the expedited procedure provided for in Article 105(1) of the CJEU Rules of Procedure was rejected.

O'Connor

The O'Connor case was about whether a Member State should execute a EAW request from the UK which would entail an Irish citizen being imprisoned in the UK after Brexit, when the UK would no longer be adhering to EU Charter of Fundamental Rights.

Thomas Joseph O'Connor, who was convicted of tax fraud in London in 2007 and sentenced to four and a half years' imprisonment, absconded on bail and fled to Ireland. The UK issued a EAW in 2014 and he was arrested in Ireland on this basis. The history of the attempts to secure Mr O'Connor's surrender to the UK is set out in the High Court

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39 CJEU in RO case, C-327/18 PPU

40 The Guardian, Irish courts told to cooperate with UK on extradition, 19 September 2018; Irish Times, Supreme Court warns Brexit may have impact on extraditions to UK, 1 February 2018

judgment of Donnelly J. on 25 July 2017 (*Minister for Justice and Equality v. O'Connor*).

The Irish High Court granted the extradition request in 2017, but Mr O'Connor was granted leave to appeal to the IESC on what was described as the "Brexit point" - the implications of Brexit for the execution of an EAW issued by the UK to serve a sentence that would extend beyond the UK's exit day.

On 1 February 2018 the IESC decided to refer to the CJEU what it described as "novel" and important issues concerning the impact of Brexit on extradition requests from the UK. In its judgment, the IESC referred to the sentence already imposed on Mr O'Connor for tax fraud and the possible sentence he could face in the UK for jumping bail.[41] Chief Justice Clarke C.J. stated that whether he was found guilty of these additional charges or not, it was very likely that Mr O'Connor would "continue to be imprisoned in the United Kingdom beyond the 29th March, 2019, when the United Kingdom will withdraw from the European Union".[42] This created serious uncertainty about whether fundamental rights protections would be applicable to Mr O'Connor and others in similar situations.

The IESC decided to refer the matter to the CJEU on 12 March 2018.

The IESC made a reference for preliminary ruling from the CJEU on 16 March 2018 (*KN v Minister for Justice and Equality* - Case C-191/18), requesting that it be expedited for a ruling under the Justice and Home Affairs[43] 'urgent procedure'.[44]

The CJEU was asked if Ireland could extradite a convicted criminal to serve a gaol sentence in the UK that would continue beyond Brexit day in March 2019. The exact questions asked were as follows:

> The uncertainty as to the arrangements which will be put in place between the European Union and the United Kingdom to govern relations after the departure of the United Kingdom; and
>
> The consequential uncertainty as to the extent to which KN would, in practice, be able to enjoy rights under the Treaties, the Charter or relevant legislation, should he be surrendered to the United Kingdom and remain incarcerated after the departure of the United Kingdom,
>
> Is a requested Member State required by European Union Law to decline to surrender to the United Kingdom a person the subject of a European arrest warrant, whose surrender would otherwise be required under the national law of the Member State,
>
> in all cases?

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41 IESC, para 5.8

42 Ibid

43 Justice and Home Affairs (JHA) is now Title V of Part 3 of the TFEU known as the Area of Freedom, Security and Justice.

44 See Article 107 of the Rules of Procedure of the Court: "A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules".

In some cases, having regard to the particular circumstances of the case?

In no cases?

If the answer to Question 1 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether surrender is prohibited?

In the context of Question 2 is the court of the requested Member State required to postpone the final decision on the execution of the European arrest warrant to await greater clarity about the relevant legal regime which is to be put in place after the withdrawal of the relevant requesting Member State from the Union

in all cases?

In some cases, having regard to the particular circumstances of the case?

In no cases?

If the answer to Question 3 is that set out at (ii) what are the criteria or considerations which a court in the requested Member State must assess to determine whether it is required to postpone the final decision on the execution of the European arrest warrant?

On 30 May 2018 the CJEU refused the Irish Court's request that the 'expedited procedure' be used.

Further reading

- European Papers, Minister for Justice v. O'Connor: A Decisive Moment for the Future of the EAW in the UK, Cristina Sáenz Pérez, 24 June 2018

- Centre for European Policy Studies (CEPS), No. 2018-02, The Effect of Brexit on European Arrest Warrants, Petra Bárd, April 2018

RO

In RO the CJEU has clarified to a large extent questions asked in KN and M.A, S.A. & A.Z.

The UK issued two EAWs in respect of RO (Case C-327/18 PPU) in January 2016 and May 2016 on charges of murder, arson and rape. RO was arrested in Ireland on the basis of these arrest warrants and has been in custody since 3 February 2016. RO objected to his surrender to the UK authorities on the basis, among other things, of issues related to the UK's withdrawal from the EU. He argued that he would be imprisoned in a country that was no longer an EU Member State, so he might not be guaranteed certain fundamental rights and rights relating to the deduction of periods of detention in other EU countries.

The Irish High Court ruled against RO on all of his points of objection, other than issues regarding the consequences of Brexit and asked the CJEU whether, in light of the UK's notice of intention to leave the EU and the uncertainty as to the arrangements that will follow Brexit, it is

required to decline to surrender to the UK a person subject to an EAW whose surrender would otherwise be required.[45]

The High Court requested that the reference for a preliminary ruling be dealt with under the 'urgent procedure' provided for in Article 107 of the Court's Rules of Procedure, which the First Chamber of the CJEU decided on 11 June 2018 to grant.

Advocate General's Opinion

On 7 August 2018 Advocate General Maciej Szpunar, in his Opinion on the case, proposed that the CJEU find that the EAW system should continue to apply for as long as the UK is a Member State.[46] He rejected RO's argument that the UK's withdrawal notice constituted an "exceptional circumstance" which requires non-execution of an EAW. In his view, as long as a State is still a Member of the EU, EU law applies, including the EAW framework Decision provisions and the duty to surrender. Also, as there was no basis to question the UK's continued commitment to fundamental rights, there appeared to be no reason not to execute the EAW in question.

CJEU judgment

On 19 September the CJEU ruled that, all other requirements of the EAW Framework Decision[47] being satisfied, the UK EAWs should continue to be executed in the lead-up to Brexit and that there was no justification for refusing to execute a EUW:

> [m]ere notification by a Member State of its intention to withdraw from the European Union in accordance with Article 50 cannot be regarded, as such, as constituting an exceptional circumstance … capable of justifying a refusal to execute a European arrest warrant issued by that Member State.

The Court said that to do so would represent a "unilateral suspension" of the system by Ireland, that "irrespective of EU law", the suspect's rights were protected by UK law, and there was "no concrete evidence to suggest that RO will be deprived of the opportunity to assert those rights before the courts and tribunals of that Member State after its withdrawal from the European Union".

The CJEU concluded:

> Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union in accordance with that article does not have the consequence that, in the event that that Member State issues a European arrest warrant with respect to an individual, the executing Member State must refuse to execute that European arrest warrant or postpone its execution pending clarification of

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45 Press release No 124/18, 7 August 2018. Advocate General's Opinion in Case C-327/18 PPU Minister for Justice and Equality v RO.

46 Advocate General's Opinions are not binding on the CJEU; they propose to the Court, independently, a legal solution to the cases for which they are responsible.

47 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States

> the law that will be applicable in the issuing Member State after its withdrawal from the European Union.[48]

The outcome of this case could be relevant in the other extradition cases.

Further reading

- EU Law Analysis, Brexit means…no legal changes yet: the CJEU rules on the execution of European Arrest Warrants issued by the UK prior to Brexit Day, Steve Peers, 19 September 2018
- Financial Times, EU should not block extradition orders to UK before Brexit, says ECJ opinion, 7 August 2018
- France24, EU extraditions to Britain should continue until Brexit: court, 7 August 2018.

Implications for other extradition cases?

Commentators suggest the RO judgment could have implications for other extradition cases, including MA and others, and KN (see above). Others who could be affected by the ruling include:

- **Declan Duffy**, a former leader of the Irish National Liberation Army who was convicted of the 1992 killing of a British soldier. Mr Duffy was convicted in 2010 but released on license by a Northern Irish parole board in March 2013 under terms in the Good Friday Agreement. But the UK said his involvement in assaults and false imprisonments in 2015 breached the conditions of his release and a European Arrest Warrant was issued for his extradition from Ireland to Northern Ireland in September 2016.

- **TM**. The UK sought the surrender of TM for the purpose of criminal prosecution and he was arrested on 3 May 2017 on a EAW issued. The Irish High Court found in June 2018 that it is entitled, of its own motion, to consider granting bail to a man sought for surrender pursuant to a EWA. Ms Justice Aileen Donnelly said that where the man had not applied for bail, but where it was almost certain that he would be further remanded pending the outcome of the "Brexit issue", it was important to clarify the extent of the Court's responsibility to protect the right to liberty. The Court found there was no legislative provision preventing it from considering bail of its own motion and invited the Minister for Justice and Equality to make submissions on why bail should be refused. TM's case was adjourned pending the outcome of the O'Connor case.

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[48] Curia, judgment in Case C-327/18 PPU, 19 September 2018; see also press release 135/18.

8. EU trademark protection

There has been some speculation about the implications of Brexit with regard to European Trademarks (EUTMs) and Registered Community Designs (RCDs) and the status of UK brand owners' rights after March 2019.

The following case began long before the EU referendum and involved a company that manufactures breath alcohol and drug testing technology. An action was brought in August 2015 against a decision of the First Board of Appeal of the EU Intellectual Property Office (EUIPO) (Case R 1323/2014-1) relating to invalidity proceedings between Lion Laboratories (Barry, UK) and Alcohol Countermeasure Systems (International) (headquartered in Toronto, Canada).[49] The case was referred to the EU General Court and on 29 March 2017 in *Alcohol Countermeasure Systems (International) v European Union Intellectual Property Office (EUIPO)* (Case T-638/15), that Court dismissed the action and ordered Alcohol Countermeasure Systems (International) Inc. to pay the costs.

An appeal was brought on 7 June 2017 by Alcohol Countermeasure Systems (International) Inc. against the judgment of the General Court. In Case C-340/17 P[50] the company argued that after Brexit a UK right must not trump an existing EU trade mark protection. The appellant claimed the CJEU should:

> as a preliminary ruling and absent EUIPO's written approval to suspend enforcement of the judgment, suspend the application of the judgment;
>
> cancel and set aside the judgment on the grounds laid down in this Petition [...];
>
> cancel EUIPO's First Board of Appeal decision R 1323/2014-1 dated August 11, 2015;
>
> alternatively cancel the judgment and order a stay on proceedings until the end of the Brexit process or at the earliest May 31, 2019 corresponding to the deadline set forth in article 50 of the Treaty;
>
> order Lion Laboratories and the European Union Intellectual Property Office to bear their own costs and to pay the costs of ACS relating both to the proceedings at first instance in Case T-638/15 and to the appeal.

The last of the pleas in law and main arguments read:

> The fifth ground raises a public order issue: a UK earlier right shall not permit the cancellation of a EU mark in light of the Brexit process and article 50 of the European Union Treaty notification sent by the United Kingdom. Permitting such a cancellation would increase expenses and create unnecessary and disproportionate

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49 For information on the Alcolock TM, see https://euipo.europa.eu/eSearch/#details/trademarks/008443301; Alicante News, May 2017, Case Law (Alcolock)

50 "Appeal brought on 7 June 2017 by Alcohol Countermeasure Systems (International) Inc. against the judgment of the General Court (First Chamber) delivered on 29 March 2017 in Case T-638/15: Alcohol Countermeasure Systems (International) v EUIPO"

> obstacles to unitary trade mark protection, while in 2 years or less, the United Kingdom will no longer be part of the EU unitary trade mark system. The General Court therefore violated the territoriality principle recognized by the 1883 Paris Convention and Article 17 of the Charter of Fundamental Rights of the European Union.

This has raised concerns among interested parties, such as those set out by the IP Federation on 1 November 2017:

- the UK remains a fully-functioning member of the EU during the Brexit negotiation phase and therefore part of EU institutions such as the EUIPO with no alteration;
- accordingly, a UK trade mark should be treated no differently to a national trade mark granted in any other member state of the EU;
- speculation on the future relationship between the UK and the EU has no bearing on current trade mark law or its interpretation in the courts; and
- it has not been decided that, after the UK leaves the EU, it will no longer be part of the EU unitary trade mark system.

The UK intervened in the appeal, arguing that the Brexit-related ground of appeal was inadmissible and unfounded.

On 29 November 2018 the CJEU dismissed the appeal in its entirety, saying there was no requirement for the Court to stay proceedings as a result of the leave vote or Article 50 notification, and that there was no retroactive effect of those measures (para 117). It also stated that notification under Article 50 did not have the effect of suspending the application of EU law: "EU law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union" (para 118)

Further reading

- Brick Court Chambers, Brexit.law, Court of Justice rules on the effect of Brexit on trade marks, 7 December 2018
- Gov.UK, IP and BREXIT: The facts, Facts on the future of intellectual property laws following the decision that the UK will leave the EU, last updated 25 September 2018
- DLA Piper, Update on position of European Trademarks and Registered Community Designs following Brexit, 26 March 2018
- Centre for International Governance Innovation and British Institute of International and Comparative Law. Brexit: The International Legal Implications. Paper No. 7: The Effect of Brexit on Trademarks, Designs and Other "Europeanized" Areas of Intellectual Property Law in the United Kingdom, Marc Mimler, December 2017
- International Bar Association, summary of debate: This house believes that IP law in post-Brexit Britain will benefit from leaving the binding jurisdiction of the ECJ, 19 December 2017

- The Chartered Institute of Trade Mark Attorneys (CITMA), Our position on: Post-Brexit registered trade mark and design rights, and rights of representation, July 2017
- Tierney IP, How will the United Kingdom's departure from the European Union affect pan EU Trade Mark and Design rights? 7 February 2017

9. Future EU-UK relations

9.1 *Achmea*

In *Slowakische Republik v Achmea BV* (Case C-284/16) the CJEU ruled on 6 March 2018 on whether an arbitration clause in a bilateral investment treaty (BIT) concluded between the Netherlands and the former Czechoslovakia in 1991 was compatible with EU law and, in particular, with the autonomy of the EU legal order. The ruling could have implications for other EU trade deals – e.g. with the UK after Brexit - with mechanisms for dispute settlement.

The Dutch financial services company Achmea took a claim to arbitration under the Slovakia-Netherlands BIT with a complaint about a Slovakian law which prevented private health insurers from distributing profits to shareholders. The arbitration tribunal in Frankfurt, Germany, awarded Achmea compensation of €22.1 million. Slovakia applied to the German courts to set aside that award, arguing that Article 8 of the BIT was incompatible with EU law. The German Federal Court of Justice referred the question of compatibility to the CJEU.

On 6 March 2018 the CJEU found that the award of damages in 2012 to Achmea from Slovakia under the BIT inherited from the former Czechoslovakia violated EU law. The CJEU said that all courts and tribunals applying EU law must be able to request a ruling on points of EU law. But the investment arbitration tribunals could not be viewed as courts or tribunals of an EU Member State, so a request could not be received from such tribunals: "The arbitration clause in the BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law".

A Bar Council guest blog by Philip Moser QC and Evanna Fruithof on 8 March commented on its implications for any future EU-UK agreement:

> On the identity of the ultimate arbiter of disputes arising under a future partnership agreement (as opposed to the initial lawfulness of such an agreement itself under EU law), the UK intends that this "cannot be the court of either party", i.e. not the ECJ. The Achmea judgment … sounds a warning in that regard. Insofar as any independent EU-UK arbitral tribunal would also be interpreting EU law, the ECJ (which jealously guards its autonomy) would likely see this as having an adverse effect on the autonomy of EU law, and therefore as being incompatible with the Treaties.

Further reading

- Kluwer Arbitration Blog, What Next for Intra-EU Investment Arbitration? Thoughts on the Achmea Decision, Neil Newing, Lucy Alexander, Leo Meredith, 21 April 2018
- International Litigation Blog, Achmea: Potential Consequences for CETA, the Multilateral Investment Court, Brexit and other EU trade and investment agreements, Quentin Declève and Isabelle Van Damme, 13 March 2018

- Max Planck Institute Luxembourg for Procedural Law, Research Paper Series N° 2018 (3), The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice, Prof. Dr. Dres. h.c. Burkhard Hess, March 2018
- EFILA blog, UK post-Brexit cannot escape the impact of EU law and of the Court of Justice of the EU, Prof. Dr. Nikos Lavranos, LLM (Secretary General of EFILA), 26 September 2017
- Opinion of Advocate General Wathelet, 19 September 2017

BRIEFING PAPER
Number 8415
6 December 2018

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