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Wightman and the revocability of Article 50

On 21 September, the Scottish Court of Session – the highest court in Scotland – overturned an earlier decision and permitted a group of cross-party politicians to refer a question to the European Court of Justice (ECJ) as to the revocability of an Article 50 notification (*Wightman v Secretary of State for Exiting the European Union*). The poor reaction to Theresa May's proposed Chequers plan, from the public and from EU leaders at the Salzburg Summit, make the full hearing to answer this question, scheduled for 27 November, all the more relevant.

SIGNIFICANCE OF *WIGHTMAN*

In the much-publicised case of *Miller* last year, the Supreme Court held that the UK Government could not trigger Article 50 of the Treaty on European Union (TEU) without Parliament's consent. However, the Court did not determine whether the subsequent notification under Article 50 could be revoked – indeed, both sides agreed that it could not. Now, the petitioners in *Wightman* are seeking to have this question resolved.

The petition was initially rejected in February on the basis that it was *"hypothetical"* and *"academic"* and so the successful appeal is significant even before the ECJ give their answer. The Scottish court decided that the question was *"neither academic nor premature"* and that the answer was crucial for clarifying the options of MPs in the lead-up to any vote ratifying or rejecting an agreement between the UK Government and the EU Council.

The political importance of this question means that there have been passionate proponents of both sides of the debate. The novelty of the issues to be decided makes the outcome uncertain but the political ramifications are likely to be significant, whichever way the decision falls.

ARTICLE 50

Article 50 lays out the process for a Member State to withdraw from the European Union, specifying that withdrawal will take place two years after the Member State in question gives notice of intention to do so (or earlier if agreement is reached). Article 50 is wholly silent on whether this notification can be withdrawn without the agreement of the remaining Member States, although there are aspects of the wording which suggest the ability to withdraw the notice:

- The purpose of the notification is to signal an *"intention"* to withdraw, which is not indicative of being a binding commitment.
- The re-joining process referred to in the Article is specifically stated as being relevant to states who have *"withdrawn"* not those who have simply notified.
- The crucial absence of any express provision stating that a Member State has to re-join anew once notification is made, or that it cannot be revoked.

WHAT IS THE SIGNIFICANCE OF THE AUTOMATIC TERMINATION AFTER TWO YEARS?

Those arguing against revocation point to the two-year notice period as being inconsistent with a right to revoke the notice. However, it could also be argued that the two-year notice period exists to provide a fixed period of negotiation for a withdrawal treaty, avoiding the possibility of negotiations over an indeterminate period. Revocation of the notice to withdraw would also achieve the effect of ending uncertainty.

As to the entirely valid concerns expressed over the potential for abuse of process if a Member State unilaterally withdraws a notification only to re-notify and extend the two-year deadline, arguably a withdrawal of notification should be allowed if it is made in good faith.

WHAT ROLE DOES CUSTOMARY INTERNATIONAL LAW PLAY?

Article 68 of the 1969 Vienna Convention on the Law of Treaties provides that a notification of withdrawal from a treaty may be revoked at any time before it takes effect. Some argue that Article 68 is representative of customary international law and that the absence of an express prohibition on revocation in Article 50 means that the ECJ is bound to interpret Article 50 as importing the right to revoke under the Vienna Convention.

Article 50 appears in the Treaty on European Union, which is governed by EU law, not public international law, but ultimately, it will be up to the ECJ in this case to decide if Article 68 of the Vienna Convention applies to the process under Article 50.

WHAT NEXT?

This case raises difficult questions of EU and international law on which there is little precedent, so the ECJ decision is uncertain. There are good arguments in favour of interpreting a withdrawal right into the Article 50 process, and indeed, Lord Kerr, one of the drafters of the provision, has spoken out to say that it was intended for Member States to be able to change their minds if necessary.

The UK Government has expressed disappointment at the Court of Session's ruling, reiterating their commitment to Brexit regardless of the ECJ's ruling in November. It has recently applied for permission to appeal the Court of Session's decision to the Supreme Court and that application will be heard on 8 November. In the meantime, the ECJ referral will proceed. Assuming that the referral is neither withdrawn nor stayed following the 8 November application, whatever the outcome, the ECJ's decision is likely to be significant, not least for MPs deciding whether to accept an imperfect withdrawal deal presented to Parliament or to reject it and face a no-deal scenario. We will keep you posted.

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