

IN THE MATTER OF THE UNILATERAL REVOCABILITY OF ARTICLE 50 OF THE
TREATY ON EUROPEAN UNION

OPINION

1. This Opinion considers whether the Prime Minister could before 29 March 2019 revoke her letter of 29 March 2017 notifying the European Council of the United Kingdom's intention to leave the European Union, with the consequence that the United Kingdom would remain in the European Union and maintain its current privileges, including its opt-outs, its rebate, and its non-membership of Schengen and the Euro. For the reasons set out below we conclude that the United Kingdom could do so but that after 29 March 2019 that possibility would be lost. Were the United Kingdom to change its mind about membership of the EU after that date, it would have to re-apply for membership under Article 49 of the Treaty on the European Union ("TEU"). At that point, to re-enter it would require the agreement of all the other Member States. It would then be a matter for negotiation whether the United Kingdom could re-obtain any of its current terms of membership.
2. There is no direct precedent to assist in the determination of whether a notification under Article 50 of the TEU is unilaterally revocable, that is, whether it could be withdrawn by the United Kingdom without the agreement of the remaining 27 Member States.
3. Article 50 provides:
 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning

of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

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 re-join, its request shall be subject to the procedure referred to in Article 49.”

4. Accordingly, if a Member State either reaches an agreement, or does not reach an agreement within two years of its notification, its membership of the EU ends. After that point, a Member State can apply to re-join pursuant to Article 50(5). The provision is wholly silent as to what happens during the two year interim period, that is, before the Member State becomes a third country and in particular, whether revocation of a notification given under Article 50(1) is permitted during that period. For the reasons set out below, our view is that a notification can be withdrawn by a Member State acting in good faith¹ within that period and that there is no need for other Member States to grant their consent in that regard.

The wording, object and purpose of Article 50

5. Article 50 refers to a decision to notify an ‘intention’ to withdraw. That wording was used by the Prime Minister in her letter of notification, in which she stated:

“I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom’s intention to withdraw from the European Union.”

¹ In accordance with the principle of sincere cooperation.

6. An 'intention' is not a binding commitment; it can be changed or withdrawn. This is so as a matter of ordinary language. For example, an individual may leave his country, with the intention of never returning but may then change his mind and move back. There is nothing in the wording of Article 50(1) that suggests 'intention' should be given any other meaning than its normal meaning. Indeed, had the drafters meant 'intention' to be read as constituting a binding decision that could not be reversed, one would expect them to have said so.
7. Moreover, it is clear that until a Member State leaves the EU, whether by agreement at some date prior to the expiry of the two year period or simply by virtue of expiry of that period, the Member State remains a full member of the EU. It follows that there is nothing to prevent it during that period from unilaterally changing its intention to withdraw and reverting to the *status quo ante*.
8. This reading is supported by the fact that Article 50(5) specifically provides that it is only after a Member State has left that it has to re-apply to join. Had the drafters intended that once a notification had taken place, a Member State would have to request re-admission (or seek the consent of the other Member States to stay), then one would have expected Article 50(5) to refer to the position not just after withdrawal, but also after notification.
9. Such an interpretation accords with the object and purpose of Article 50. The EU's competences are based on the consent of its Member States. The authority to increase or reduce these competences (*Kompetenz-Kompetenz*) is within their hands. Article 50 TEU is an example of the principles of consent and conferral; it confirms the right of a Member State to withdraw from the Union. In the words of the German Federal Constitutional Court, the '*right to withdraw underlines the Member States' sovereignty... If a Member State can withdraw based on a decision made on its own responsibility, the process of European integration is not irreversible.*' (Lisbon case, para 329). The purpose of Article 50 TEU is therefore to confirm in express terms the Member States' ability to withdraw from the EU on a voluntary basis and to lay down the procedures for doing so.

Vienna Convention on the Law of Treaties

10. In interpreting Article 50, regard may be had to the VCLT. As the CJEU stated in Case C-410/11, "*even though the Vienna Convention on the Law of Treaties of 23 May 1969 does*

*not bind either the European Union or all its Member States, that convention reflects the rules of customary international law which, as such, are binding upon the EU institutions and form part of the legal order of the European Union”.*² In the present case, the VCLT lends support to the interpretation we have advanced.

11. Articles 65-68 concern the procedure for the withdrawal of a party from a treaty. Article 67(2) reads, materially: “*Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties.*” (Emphasis added.)
12. Article 67(2) thus applies both to withdrawal instruments made pursuant to the provisions of the treaty (in this case Article 50 TEU) or those made in accordance with the default rules set out in Article 65.
13. The critical provision is then Article 68 which reads: “*A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.*”
14. The Prime Minister’s letter of 29 March 2017 to the President of the Council communicating the UK’s decision to leave the European Union constitutes an instrument for withdrawing from a treaty for the purposes of Article 67. Article 68 provides in the clearest terms that this instrument may be revoked at any time before it takes effect, which, in accordance with Article 50(3) TEU, will be either the date of entry into force of a withdrawal agreement concluded between the UK and the European Union or, failing that, two years from the date of the Prime Minister’s letter (i.e. 29 March 2019).
15. There is no language in Article 50 TEU that could serve to displace the principle contained in Article 68 VCLT. The question of whether a notice of withdrawal communicated to the European Council pursuant to Article 50(2) can be revoked before it takes effect is not addressed in the text of Article 50. The International Law Commission, which was responsible for drafting Article 68 VCLT, provided the following commentary on the rule:

² Case C-410/11, *Pedro Espada Sánchez et al. v Iberia Líneas Aéreas de España SA*, Judgment of the Court (Third Chamber) 22 November 2012.

[T]he considerations militating in favour of encouraging the revocation of notices and instruments of denunciation, termination, etc. are so strong that the general rule should admit a general freedom to do so prior to the taking effect of the notice or instrument. The Commission also felt that the right to revoke the notice is really implicit in the fact that it is not to become effective until a certain date...³

Counter-arguments

16. As regards the arguments against revocability, two essential points arise. First, it is said that the provision in Article 50(3) for automatic termination of membership two years after the notification (in the absence of agreement) is inconsistent with the right to revoke. That is in our view unpersuasive. The two year time period puts a deadline on the period during which a Member State can change its mind and the period by which negotiations must be concluded.
17. Secondly, it is said that if a notification was revocable, Member States could avoid the requirement that all the other EU member states agree any extension of time for negotiations by withdrawing its notification and then re-notifying. Effectively, Member States could use the right to withdraw as a mechanism to extend time for negotiation. Again, this argument is not a good one. Article 50(3) deals with whether a Member State can unilaterally prolong the period of notification, not whether it can unilaterally change its mind as to whether to leave altogether. Where a Member State withdrew its notification in good faith, the state having changed its mind regarding continued membership of the EU, that withdrawal would in our view be legally valid. To hold otherwise would be to afford Member States a power of expulsion in respect of an existing Member State as soon as that Member State notified an intention to withdraw under Article 50. Moreover, such an interpretation would be contrary to the principles of sincere cooperation,⁴ the Union's values,⁵ and its commitment to respect the Member States' constitutional identities.⁶

³ ILC, "Draft Articles on the Law of Treaties with commentaries", *Yearbook of the International Law Commission*, 1966, vol. II, p. 264.

⁴ Article 4(3) TEU

⁵ Article 2 TEU

⁶ Article 4(2) TEU

Conclusion

18. In light of the above, our view is that the United Kingdom may withdraw the Article 50 notification at any time prior to 29 March 2019 without needing to seek the agreement of the other EU member states. The mechanism for doing so would be a matter for Parliament and the executive but legally, there is nothing to prevent it from happening.
19. We are fortified in our conclusion by the fact that a very significant weight of legal opinion takes the same view. We refer in particular to the Opinion of Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC, Helen Mountfield QC and Gerry Facenna QC,⁷ the Opinion of Professor Piet Eeckhout and Dr. Eleni Frantziou,⁸ to the evidence given by Professor Wyatt and Sir David Edward to the House of Lords EU Committee,⁹ and the conclusion of that committee, to the views of Jean-Claude Piris, former Director General of the Council's Legal Service and of Martin Selmayr, of the Commission. Finally, we note that one of the drafters of the provision, Lord Kerr is clear that the intention was that an Article 50 notification be revocable.

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⁷ https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf

⁸ Piet Eeckhout and Eleni Frantziou, Brexit and Article 50 TEU: A Constitutionalist Reading, UCL, December 2016.

⁹ 4 May 2016 - HL Paper 138

<https://publications.parliament.uk/pa/ld201516/ldselect/ldcom/138/13804.htm> Evidence at:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/europe-an-union-committee/the-process-of-leaving-the-eu/written/32079.html>