IN-DEPTH ANALYSIS
For the AFCO committee

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The (ir-)revocability of the withdrawal notification under Article 50 TEU

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CONSTITUTIONAL AFFAIRS

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IN-DEPTH ANALYSIS

Abstract

This in-depth analysis examines the issue of the possible revocation of a withdrawal notification under article 50 TEU. In light of the ongoing negotiations on the UK's withdrawal from the EU, the possibility for the UK to revoke its withdrawal notification has become a significant political and legal/institutional issue. The analysis examines the case of revocation of a withdrawal notification under international law and under the EU law and assesses the various positions expressed so far on the matter.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
EU	European Union
IAEA	International Atomic Energy Agency
ILC	International Law Commission
ICC	International Criminal Court
NPT	Non-Proliferation Treaty
PARLACEN	Parlamento Centroamericano
SICA	Sistema de Integración Centroamericana
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UKSC	United Kingdom Supreme Court
VCLT	1969 Vienna Convention on the Law of Treaties
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WHO	World Health Organisation

1 INTRODUCTION[1]

The June 2016 referendum on the withdrawal of the United Kingdom (UK) from the European Union (EU) and, following its outcome, the official notification by the UK government of the UK's decision to withdraw from the EU in accordance with the provisions of Article 50 of the Treaty on European Union (TEU), have raised a countless number of questions of an institutional and constitutional nature - both in the UK and in the EU[2]. Even though some of these questions regard the institutional balance within the UK (such as the parliamentary involvement in the withdrawal process and the role of the devolved administrations), the most salient ones largely have to do with the legal and political implications of the process initiated under Article 50 TEU.

Article 50 TEU stipulates the following:

> *"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.*
>
> *5. A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.*
>
> *6. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49".*

Although this Article describes a full process for the withdrawal of a Member State, it is relatively succinct and does not contemplate all the ramifications that such an extraordinary process entails. Among the issues where Article 50 remains silent is the possibility for the UK (or any Member State in similar circumstances) to revoke its withdrawal notification under Article 50 before it takes effect.

This question, which had hardly received any academic or other attention in the past, became of central importance following the Brexit referendum and, even more, after the formal notification by the UK government, on 29 March 2017, of its intention to withdraw from the EU. The increasing apprehension over the outcome of the withdrawal negotiations and the complexities of the disentanglement of the UK from the EU as well as, for some, the desire to reverse the referendum result brought to the forefront the case of the revocation by the

[1] Special thanks to Benjamin Hulme, trainee with the Policy Department for Citizens' Rights and Constitutional Affairs, for the background research and the assistance for the completion of this paper.
[2] For a comprehensive analysis of the legal and institutional implications of Brexit see, among others, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs «Brexit and the European Union: Institutional and Legal Considerations» (authors Tell Cremades, M and Novak, P). January 2017, in http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571404/IPOL_STU(2017)571404_EN.pdf.

UK of its decision to withdraw from the EU, either through a second referendum or by other parliamentary means. Although neither the UK government nor the Labour opposition have so far suggested reversing the withdrawal process, individual UK[3] and EU politicians[4] have referred to such a possibility, which has also become a significant topic of academic debate.

Article 50 TEU does not address the case of revoking a withdrawal notification. Paragraphs 1-3 of the Article describe the withdrawal process which should be concluded with an agreement or, failing that, the automatic cessation of the Treaties' application after two years, unless this period were extended by the European Council. Paragraph 4 delineates the limitations of participation in the Council meetings of the withdrawing member state and paragraph 5 provides for the pathway of accession under Article 49 TEU for any state that has withdrawn and desires to re-join the EU.

Given the absence of any reference to a right to revoke the notification in the Treaty, it is generally assumed that, even though the matter remains hypothetical, in such an event it will be up to the Court of Justice of the European Union (CJEU) to ultimately rule on such a possibility. It is, however, important to clarify, to the extent possible, the question both from the point of view of the analogous application of relevant public international law provisions and in the context of Article 50 TEU and, more widely, the EU legal order. This analysis looks in the first place at the right of a state to revoke a decision to withdraw from an international treaty under public international law and, in particular, under the relevant provisions of the Vienna Convention on the Law of Treaties (VCLT). At a second stage, it studies how and to what extent EU law and doctrine have already dealt with this issue before the UK decided to withdraw and, in a third part, it analyses the arguments put forward in favour or against revocation in the current context of the Brexit negotiations. A fourth part examines some additional issues that may arise under each option (revocability or impossibility to revoke).

[3] See, among others, relevant statements by UK former Deputy Prime Minister Michael Heseltine, 'Brexit: Britain could reverse EU exit decision if public opinion swings back towards remain', *The Independent*, 6 September 2016, in http://www.independent.co.uk/news/uk/politics/brexit-latest-eu-exit-decision-reversal-u-turn-public-opinion-remain-economy-austerity-michael-a7931606.html ; by former Labour Prime Minister Tony Blair, 'Tony Blair calls for people to 'rise up' against Brexit', *BBC news*, 17 February 2017, in http://www.bbc.com/news/uk-politics-38996179 and by former Liberal Democrat leader Tim Farron, 'Article 50 can be revoked', *BBC news*, 7 December 2016 in http://www.bbc.com/news/uk-politics-38240121.

[4] See, among others, the declaration of French President Emmanuel Macron on 13 June 2017 during a meeting with UK PM May when he stated that "the door is evidently open for the UK" in the event it changed its mind, in http://www.elysee.fr/videos/declaration-conjointe-d-emmanuel-macron-et-de-theresa-may-premier-ministre-du-royaume-uni/; European Council's president Donald Tusk also expressed a similar opinion on 29 March 2017 in http://www.independent.co.uk/news/uk/politics/brexit-article-50-donald-tusk-eu-president-we-miss-you-already-happy-day-brussels-a7655966.html as did former German Finance Minister Wolfgang Schäuble who, on 13 June 2017, declared that "should the British change their decision [to leave the EU], then they would naturally find an open door" in http://www.handelsblatt.com/politik/deutschland/schaeuble-zu-grossbritannien-exit-vom-brexit-die-briten-wuerden-auf-offene-tueren-stossen/19928246.html.

2. REVOCATION OF A WITHDRAWAL NOTIFICATION UNDER INTERNATIONAL LAW

The international legal system is based on the fundamental principle of *pacta sunt servanda* (treaties must be obeyed) as enounced in Article 26 VCLT. As a result, international law and its main subjects, the states, are traditionally reluctant with regard to states' unilateral decisions to withdraw from treaties they have freely subscribed to.[5] This said, there are reasons of an international or domestic nature (such as a change in the geopolitical context or, merely, a change in political preferences) that may drive a state to withdraw from a treaty.[6] The international community has, consequently, accepted this fact and international law codification efforts have intended to regulate rather than prohibit withdrawals and to establish clear grounds and, in particular, agreed procedures to avoid unilateral actions and allow for a negotiated withdrawal process.

For this purpose the Vienna Convention on the Law of Treaties (VCLT) provides in its Article 54 that

> *"The termination of a treaty or the withdrawal of a party may take place:*
> *(a) In conformity with the provisions of the treaty; or*
> *(b) At any time by consent of all the parties after consultation with the other contracting States".*

Withdrawals from, and denunciations of, multilateral treaties have been a relatively rare but present phenomenon in contemporary international law and international relations.[7] In contrast, the revocation, by a state, of a withdrawal notification before such withdrawal takes effect or is concluded, is a much more uncommon (and even less studied) phenomenon. It is generally assumed that a state, before taking a decision to denounce a treaty and leave an international organisation, has considered carefully the various implications of its decision; consequently, it has been extraordinary that states change their mind before the entire withdrawal process is concluded.[8]

Very few treaties include a specific provision on revocation of withdrawal notice -in fact, a problem in international law is that several international treaties do not contain an explicit exit clause, much less a provision to revoke a decision to leave. In the League of Nations, whose Covenant allowed for the withdrawal of a state, Spain and Brazil, after their claims to permanent seats on the League's Council were rejected, in 1926, gave notification of withdrawal: while Brazil eventually withdrew, Spain reconsidered the matter before its withdrawal became effective and again took an active part in the ninth League of Nations Assembly, in 1928.[9] During the early Cold War period, several states of the Soviet Bloc withdrew from the World Health Organisation (WHO)[10] and from the UNESCO on ideological

[5] See Helfer R. L., 'Exiting treaties', *Virginia Law Review*, Vol. 91, November 2005, pp. 1579-1648 in p. 1580.
[6] This is, in particular, the case for the general provision of '*rebus sic standibus'* (or as enounced in Article 62 VCLT 'a fundamental change of circumstances'). It has to be further pointed out, though, that, even under this customary international law provision for states' protection, a termination of, or withdrawal from, a treaty on the grounds of a fundamental change of circumstances is very narrowly interpreted in VCLT.
[7] Helfer (op. cit. pp. 1602-5) has compiled a figure of 1.547 denunciations and withdrawals from all multilateral Treaties registered with the United Nations from 1949 to 2004. This figure has to be compared with the 32.021 ratifications of Treaties during the same period.
[8] This analysis discusses the issue of a 'genuine' withdrawal decision and a 'genuine' decision to revoke it which should be distinguished from the threats or declarations of intention to withdraw which may be more frequent and aim to secure better bargaining positions for the 'menacing' state within the international organisation. In such cases, neither the withdrawal announcement nor the possible subsequent revocation announcement can be considered to fulfil the formal requirements as set in the Vienna Convention on the Law of Treaties below.
[9] Magliveras, D. K., 'The Withdrawal From the League of Nations Revisited', *Penn State International Law Review* 25, Vol. 10, 1991, pp.50-52.
[10] Nine states withdrew from the WHO between 1949 and 1950 (all European socialist countries with the exception of Yugoslavia).

and political grounds.[11] The constitutive charters of the two organisations did not provide, at the time, for a withdrawal procedure.[12] Consequently, other, mostly Western, state Parties challenged the unilateral character of the withdrawal and claimed that withdrawal should require the consent of the other state Parties. However, the withdrawing states rejected this claim on the grounds of a general principle of international law not to compel states to remain unwillingly in an international treaty.[13] The matter was never definitely settled, but when, subsequently, these countries decided to return to the two organisations, their readmission was not treated as a new application[14]; they announced that they revoked their withdrawal.[15] In 1993, North Korea announced its intention to withdraw from the Non-Proliferation Treaty (NPT) following disagreements over inspections by the International Atomic Energy Agency (IAEA). Subsequently, following negotiations with, among others, the USA, North Korea suspended its withdrawal, an act which was considered as a revocation of its withdrawal by the IAEA.[16] In 2009, the government of Panama decided (and confirmed by an Act of its Parliament) to withdraw from the Central American Parliament (Parlacen), an institution of the Central American Integration System (SICA) but which has been established under a separate international treaty; it also proceeded to the official notification of withdrawal.[17] The Central American Court of Justice and, later on, Panama's own Supreme Court, ruled, though, that such decision was invalid and unconstitutional.[18] As a result, Panama again took an active part in the Parlacen in 2013 and both sides considered this return as a revocation of an illegal notification of withdrawal.[19]

Two more recent well-known cases are connected with the withdrawal from the Rome Statute that established the International Criminal Court (ICC). In November 2016, The Gambia notified to the United Nations Secretary-General its decision to withdraw from the ICC. However, in February 2017, following the election of a new President who had a different approach on the matter from his predecessor, the country notified the annulment of its withdrawal decision with immediate effect.[20] Similarly, in March 2017, the Government of South Africa notified its decision to revoke, with immediate effect, the instrument of withdrawal from the Rome Statute it had deposited with the Secretary-General of the United Nations on 19 October 2016;[21] the revocation, in this case, followed a successful challenge

[11] For an analysis of the withdrawal from the UNESCO see *The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27,* European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, March 2017, pp. 35-36, in http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583135/IPOL_STU(2017)583135_EN.pdf

[12] Subsequently UNESCO changed its Constitution to allow for the withdrawal of its Members.

[13] Dock M.C., 'Le retrait des membres des organisations internationales de la famille des Nations Unies', *Annuaire Français de Droit International*, 1994, pp. 106-155, p. 111.

[14] The relevant resolution adopted by the WHO World Health Assembly (Resolution WHA 9.9 during its ninth session in May 1956) invited them to take back their place in the organization. See Official Records of the WHO, No. 71, Ninth World Health Assembly, 7-25 May 1956, resolution 9.9 on the resumption by certain members of active participation in the World Health Organisation, pp. 19-20, in http://apps.who.int/iris/bitstream/10665/85678/1/Official_record71_eng.pdf

[15] The returning states even had to pay a small amount (a 'token fee' of five per cent) of their membership fees for the years of absence. See Scermers G.H., 'The International Organizations' in *International Law: Achievements and Prospects*, Ed. Bedjaoui M, Paris and Dordrecht: UNESCO and Martinus Nijhoff, 1992, in pp. 84-85.

[16] Masahito A., 'Arms Control law in crisis? A study of the North Korean nuclear issue', *Journal of Conflict & Security Law,* Vol. 9, No 3*, 2004*, pp. 331–355. Eventually North Korea withdrew definitely from the NPT in 2003.

[17] 'Salida de Panamá del PARLACEN', Official communication by the Ministry of Foreign Affairs of Panama, in http://www.mire.gob.pa/index.php/es/noticias-mire/4755-.

[18] 'Corte Suprema declara inconstitucional la salida de Panamá del Parlacen', *El Universal*, 24 January 2012, in http://www.eluniversal.com/internacional/120124/corte-suprema-declara-inconstitucional-la-salida-de-panama-del-parlace.

[19] Panama's members of the Parlacen who belonged to the opposition parties continued to attend it and, in the event, Panama had to pay the arrears for its contribution during the gap years, in http://www.parlacen.int/Actualidad/Actualidad/tabid/146/EntryId/369/Reintegro-de-Panama-al-PARLACEN.aspx .

[20] 'Assembly of States Parties President welcomes Gambia's decision not to withdraw from the Rome Statute', *ICC* [Press Communique], 17 February 2017, in https://www.icc-cpi.int/Pages/item.aspx?name=PR1274.

[21] 'Assembly of States Parties President welcomes the revocation of South Africa's withdrawal from the Rome Statute', [Press Communique], 11 March 2017, in https://www.icc-cpi.int/Pages/item.aspx?name=pr1285.

of the original decision to withdraw before the South African courts. [22] In both cases, revocation did not alter the relationship of the two countries with ICC or their status within the Court.

2.1. Article 68 of the Vienna Convention on the Law of the Treaties

Revocation of a decision to withdraw from a multilateral treaty is governed, under international law, by Article 68 VCLT, which provides that:

> *"A notification or instrument provided for in Article 65 or 67 may be revoked at any time before it takes effect".*

The VCLT does not apply directly to the TEU. The EU, as such, is not a party to the Convention, nor are certain EU Member States, such as France and Romania, while Malta only acceded to the VCLT after the TEU was signed. However, one can make the argument that customary international law can be used to complete possible gaps in the TEU: in several cases,[23] notably the *Racke* case,[24] the CJEU has accepted that the VCLT may still be relevant to the extent that its provisions reflect customary international law. This section therefore examines, firstly, whether Article 68 VCLT represents a provision reflecting customary international law and, secondly, dependent on this first assessment, whether it can, as such, be used to supplement Article 50 TEU.

Article 68 was adopted '*without dissenting vote'* in the Vienna Conference and had raised few objections in the preceding debates within the International Law Commission (ILC), which largely concerned the unilateral character of the revocation. Its objective was evident and, to the ILC, implicit: to "*afford an opportunity to a state intending to set the [withdrawal] procedure in motion to stop in its tracks, either before initiating it [...] or before bringing about any final change in treaty relations*". The Article provides for the unilateral right of a state to revoke a notification that it intends to withdraw from or denounce a treaty before this takes effect, and the unilateral right of the state to revoke the instrument with which it executes the measure notified under Article 65 (1) VCLT before this takes effect.

Article 68 is part of a group of articles (Articles 65-68) in section 4 (Procedure) of Part V of the VCLT that deal with the procedure for invoking a ground for the "invalidity, termination or suspension of the operation of a treaty". However, Article 68 does not cover any form of revocation but only the revocation of a withdrawal notification under the conditions set by Articles 65 and 67 VCLT. It has thus to be read and interpreted in conjunction with these latter articles and in the context of the entire section.

2.2. Grounds for withdrawal and revocation thereof in the Vienna Convention

Article 65 entitled "*procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*", provides that:

> *"1. A party which, under the provisions of the present Convention, invokes either a* ***defect in its consent to be bound by a treaty*** *or* ***a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation*** *[emphasis added], must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.*

[22] 'South Africa: Notice of Withdrawal from the Rome Statute Revoked', in http://www.loc.gov/law/foreign-news/article/south-africa-notice-of-withdrawal-from-the-rome-statute-revoked/.

[23] Among others, the *Poulsen* case (*Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, C-286/90) and the *Opel Austria case* (*Opel Austria GmbH v Council of the European Union*, C-115/94).

[24] In that case the CJEU affirmed that "rules of customary international law concerning the termination and the suspension of Treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order", Point 4, Judgment of 16 June 1998, *Racke GmbH & Co. v Hauptzollamt Mainz,* reference for a preliminary ruling: Bundesfinanzhof - Germany, C-162/96, EU:C:1998:293.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation".

Article 67, entitled "instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty", provides that:

"*1. The notification provided for under article 65 paragraph 1 must be made in writing.*

2. 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. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full power.".

Article 68, and, in general, the VCLT provisions on procedure were considered to be a '*progressive development*' by the ILC rather than a codification of existing customary international law.[25] This is the case in particular as concerns Article 65, the more significant of the two Articles referred to in Article 68. It must be recalled that the provisions of Article 65 were among the most difficult to agree upon, both during the ILC preparatory meetings and in the Vienna Conference itself: many states had expressed concerns over the grounds allowed for withdrawing from a treaty fearing they "*might be invoked arbitrarily as mere pretexts for 'shrugging off' inconvenient treaty obligations*".[26] The text finally adopted included strict procedural safeguards, which were agreed upon not so much because they reflected customary international law[27] but rather because they could be assumed to be "*both effective and acceptable to States*".[28] Thus, this Article allows exiting from a treaty under strict conditions, namely:

- a defect in the state's consent to be bound by a treaty or
- a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation

The limitation of the grounds for withdrawal is accompanied by strict procedural requirements, namely:

- a reasoned notification
  - a waiting period before exiting (moratorium) and
  - arrangements for the settlement of disputes.[29]

[25] *Tzanakopoulos* A., 'Commentary to Article 68' in Corten O and Klein P (eds.) ,*The Vienna Conventions on the Law of Treaties - a Commentary, Vol. II*, Oxford and New York, Oxford University Press 2001*. p. 1565.*
[26] See Prost, M., 'Commentary to Article 65' in Corten O and Klein P (eds.), *op. cit.* p.1484.
[27] A member of the ILC, the Egyptian Professor Abdullah El-Erian, speaking about the customary nature of [then] article 25, had stated that "the emphasis should not be on what the rules were, but on what the rules should be". Comments by Mr El-Erian, in United Nations '*Yearbook of International Law Commission'*, Summary records of the fifteenth session (6 May-12 July 1953) Vol. I, 1963', p. 177, in http://legal.un.org/ilc/publications/yearbooks/english/ilc_1963_v1.pdf.
[28] Prost op. cit. p. 1487.
[29] Ibid. pp. 1490-1501.

2.3. The applicability of the Vienna Convention in revoking a notification under Article 50 TEU

International law, in particular the provisions of the VCLT, has been proposed, alone or in conjunction with other grounds by several scholars[30] who, following the 2016 Brexit referendum, have defended that there is a right of the UK (and of any other Member State) to revoke a notification of withdrawal under Article 50 TEU. These scholars claim that the VCLT provisions on revocation as well as on the interpretation of the treaties allow the UK to, freely and unilaterally, revoke its decision to withdraw before the withdrawal process is concluded. This part will therefore examine whether these arguments can be defended under international law.

These arguments are founded both on the provisions on revocation of a withdrawal notification and on the rules for the interpretation of treaties as provided in Articles 31 and 32 VCLT. According to these arguments, the TEU is an international treaty concluded between State Parties and, though it has developed substantially, remains ultimately an international treaty. As such, the provisions of customary international law, as codified in the VCLT, should apply to the TEU; in this matter, although the TEU provides for a specific process of withdrawal, these provisions can be complemented by the general provisions of the VCLT where the TEU does not specifically provide otherwise.

As explained above, it is a matter of academic debate whether international law, in general, and the VCLT, in the specific case, can be used to supplement Article 50.

In the first instance, it is generally recognized that VCLT rules do not all constitute customary international law. This is in particular the case with the provisions on procedures which are not considered to qualify as rules of customary international law, which could therefore be invoked to complement EU law. More specifically, Article 68 VCLT is a procedural provision, set in the context of a group of provisions which all contain strong procedural elements. The prevailing opinion is that, while "*some of the requirements of Article 65 were inspired by underlying principles which, for their part, can be regarded as customary*",[31] neither the conditions nor the procedures had a customary origin but, rather, reflected the "*progressive development of the law*". Indeed, it has to be reminded that, in the *Racke* case cited above, the CJEU did indeed accept the relevance for the EU of those VCLT provisions that reflect customary international law, but expressly rejected that Article 65 VCLT constituted a rule of customary nature.[32] In line, therefore, with this reading, Article 68 VCLT cannot constitute a valid basis to supplement the provisions of Article 50 TEU and allow for an implicit right of

[30] See, among others, Streeten, C., '*Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?*', UK Const. L. Blog, 13 July 2016; Sari, A., '*Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU*', UK Const. L. Blog, 17 Oct 2016; Craig, P., '*Brexit: Foundational Constitutional and Interpretive Principles: II* ,Oxford Human Rights Hub Blog, 28 Oct 2016; The so-called '*Three Knights' Opinion'*, which is an opinion by eminent lawyers (five rather than three: Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC, Helen Mountfield QC and Gerry Facenna QC) on various Brexit-related legal issues published in February 2017, is also using international law as an additional argument. See '*In the matter of Article 50 of the Treaty on European Union'* Opinion, in https://publiclawforeveryone.com/2017/02/17/the-three-knights-opinion-on-brexit-a-response/.

[31] Prost, op. cit. p. 1487.

[32] C-162/96 op. cit. Point 59: "*It should be noted that the specific procedural requirements there [i.e. in Article 65 VCLT] laid down do not form part of customary international law*". The Opinion of the Advocate-General in that case was even more explicit: "*Article 65 of the Vienna Convention lays the relevant procedural requirements but those requirements do not seem precisely to reflect the requirements of customary international law. It seems that, as might be expected, the provisions of the Vienna Convention concerning procedural requirements are more specific and more concrete that the rules of customary international law*". Ibid. Opinion of the Advocate-General Jacobs delivered on 4 December 1997, para. 96, in http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A61996CC0162.

revocation of the notification to withdraw, in particular as it is set in a context totally different from the context provided by them.[33]

In addition, revocation under international law as prescribed by Article 68 VCLT is, as stated above, "*intimately connected to Articles 65 and 67 to which it is refers"*[34] and cannot be construed to cover all cases of withdrawal, in particular given that the customary character of these articles is not generally accepted. In fact, revocation is strictly delimitated to the specific circumstances described, in particular in Article 65: a defect in the State's consent to be bound by a treaty or a ground for impeaching the validity of the treaty.[35]

It is very difficult to relate these conditions to the specific situation of the UK – or, more generally, to the situation described in Article 50: the decision to withdraw was neither linked to a defect in the UK's consent to the EU Treaties[36] nor to a ground to withdraw related to the treaty (as would be, for instance, a modification of the treaty or its content without the UK's consent). As described above, it is also very problematic to interpret *lato sensu* the provisions on withdrawal in order to cover all forms of withdrawal and, consequently, all forms of revocation: both during the Vienna Conference and in the preceding negotiations, the states were very reluctant to accept a broad right of withdrawal from international agreements and agreed to the inscription of a right of withdrawal only under strict conditions. There is no ground to extend the interpretation of the right to revoke a notification of withdrawal which is "intimately connected to Articles 65 and 67" so as to apply it to all forms and cases of withdrawal.

In addition, it should be recalled that withdrawal from a traditional international law process is largely driven by the withdrawing state; it is reasonable that the revocation of a decision to withdraw is also driven by this state. In the context of a traditional multilateral treaty, the fact that a member state leaves has marginal effect upon the operation and decision making system of the organization: the state loses its voting rights and ceases to contribute to the budget, but in principle the organisation simply carries on without the state concerned. On the contrary, within the EU, "*this process ... is driven by the EU itself, and must be conducted according to EU law, not general public international law*".[37] The supranational *sui generis* nature of the EU and the extensive legal and real connections between Member States require a much higher involvement of the EU and of its institutions. The revocation of withdrawal

[33] Strangely, this is also the opinion of Professor Derrick Wyatt, QC in his oral and written statement before the House of Lords European Union Select Committee on the process of leaving the European Union, 8 March 2016, in http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/oral/30396.html. Professor Wyatt, who considers that there is a (unilateral) right of revocation clearly states in his supplementary written evidence, in http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/theprocess-of-leaving-the-eu/written/32079.html,%20para.%202. that "the premise of Article 54(b) [VCLT} is that a treaty can be changed if all the states which have made the treaty simply agree to do so [...but] in the case of the EU treaties, there are special procedural requirements *for the amendment of the treaties*. Amendment requires more than simply an agreement of all the Member States; the EU institutions are also involved. Under the ordinary revision procedure, unless the European Parliament agrees to the contrary, treaty revision takes place in light of a recommendation made by a Convention comprising representatives of national parliaments, national governments, the European Parliament, and the Commission. The premise of Article 54(b) (that the withdrawal provisions of a treaty can be amended simply by the unanimous agreement of the contracting states) is thus absent in the case of the EU".

[34] Tzanakopoulos, op. cit. p. 1564.

[35] See Eden P., '*Can* a notification under Article 50 TEU be unilaterally withdrawn?' UK Trade Policy Observatory, 17 March 2017, in https://blogs.sussex.ac.uk/uktpo/2017/03/17/can-a-notification-under-article-50-teu-be-unilaterally-withdrawn/.

[36] The defect in a state's consent is very difficult to demonstrate in general, the more so in the specific UK case. EU membership was voted by the UK Parliament, on more than one occasion, and was also confirmed in the 1975 referendum. International law (for instance Article 27 VCLT which stipulates that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty") does not accept domestic reasons in order to justify withdrawal on the grounds of a defect in the state's consent.

[37] Reid, S,A., 'Brexit Begins: an overview of the legal issues', EU Law Analysis blog, 28 July 2016, in http://eulawanalysis.blogspot.be/2016/07/.

cannot, thus, be construed as a free act of the withdrawing state and international law provisions cannot apply in the matter.

A wider argument against using VCLT provisions to justify the revocation of withdrawal is linked to the very nature and development of the EU: there is a long, extensive and on-going scholarly discussion - not least among constitutionalists and internationalists - on the relationship between public international law and the EU legal order since the early case law of the then ECJ.[38] This debate is intertwined with a broader one on the gradual creation of multi-level legal orders where the international, European and national orders interconnect and cross-influence each other in a perpetual mobility.

It is indeed true that international law is important for the EU legal order, not less because the EU is a construction under international law. Nevertheless, there is a growing consensus that the particular evolution of the EU has transformed it into a different form of international entity - beyond the normal ambit of international organisations and, consequently, of their regulation. This does not imply that the EU and its Member States should ignore or dismiss international law but rather that international law rationale no longer directly applies to the EU. The EU can always turn to international law for guidance on good practice and even for analogies, but it is much less clear whether it can look into international law norms for unquestioning application.

In the context of the revocation of a withdrawal notification, and irrespective of whether one considers the EU legal order as an "independent legal order",[39] a Verfassungsverbund (a constitutional compound of the EU and its Member States) or a "self-contained regime", the conclusion is more and more that the EU possesses a complete system of law in which international law norms can no longer be used as a substitute unless it is explicitly provided for in the EU Treaties. This is true in the case of the withdrawal of a Member State: Article 50 provides for the entire withdrawal process and, therefore, recourse to international law is redundant.[40] Thus, the relevant VCLT articles on withdrawal cannot and should not be applied because Article 50 TEU cannot be considered as a *lex specialis* to be supplemented by the relevant VCLT provisions as *lex generalis*.

[38] See in particular Wessel, R.A. - Blockmans, S. (eds.), *Between Autonomy and Dependence. The EU Legal Order under the Influence of International Organisations*, T.M.C, Asser Press, 2013, The Hague.

[39] Audrey S., 'Droit international non conventionnel et ordre juridique de l'Union européenne' in Benlolo-Carabot, M - Candas, U - Cujo, E*, (eds.) Union européenne et droit international,* Editions PEDON, Paris 2012. p. 664. The CJEU has consistently held that international law norms are to be taken into consideration on the basis on their impact on EU legal order.

[40] Odermatt, J., 'Brexit and International law: disentangling legal orders', *Emory International Law Review,* Vol. 31, 2017, pp. 1051-1073 p. 1065, in http://law.emory.edu/eilr/_documents/volumes/31/recent%20developments/odermatt.pdf.

3. REVOCATION OF WITHDRAWAL ON THE BASIS OF ARTICLE 50 TEU

Voluntary withdrawal from the Union was first introduced in the 2004 Constitutional Treaty during the discussions in the Convention on the Future of Europe. The provision first appeared in the "framework" draft constitutional treaty proposed by the Presidium on 28 October 2002 and the final text was presented by the Presidium in its final draft on 4 April 2003.[41] Although, the Article (both its very existence and its content) was hotly debated during the Convention, debates[42] and amendments[43] concentrated mostly on the desirability of a withdrawal clause as well as on its unilateral or negotiated character; the Convention members did not delve into the issue of a possible revocation of a decision to withdraw. Explicit reference to the possibility of revocation was made in one amendment proposed by German MEP and member of the Convention, Ms. Sylvia-Yvonne Kaufmann, to the [then article 46 on voluntary withdrawal] that included the following additional sentence: "*The revocation of the withdrawal intention can be made at any time by a declaration addressed to the President of the European Council*".[44] The amendment was not accepted by the Presidium of the Convention and eventually failed. It has to be pointed out that the amendment did not intend to deal with the issue of revocation under international law. Instead, it attempted, as several other related amendments, to limit the right of withdrawal and to establish a negotiated – rather than a unilateral – right of withdrawal from the EU. For this reason, some scholars who are favourable to the right of revocation claim that, given the original intention of the proposal, it should not be assumed, *a contrario,* that the Convention rejected the possibility of a revocation.[45] Given the context of the relevant discussions at the time this argument should be considered valid.

Following the failure of the Constitutional Treaty, the EU negotiated the TEU, which included a withdrawal clause (the current Article 50) replicating that of the Constitutional Treaty. There was no substantive discussion on the withdrawal clause, much less on a hypothetical revocation thereof, during the 2007 Intergovernmental Conference which adopted the Lisbon Treaty and the current Article 50.[46]

Before the UK's decision to withdraw, the political and legal implications of the withdrawal of an EU Member State were an interesting issue for academic discussion, usually of a speculative nature; on the contrary, the issue of revocation of a notification to withdraw had received scarce attention, as it was assumed that a withdrawal decision would be definite. From among those who explored the question, usually in the wider context of an analysis of

[41] Following the various modifications in the order of the Constitutional Treaty articles, withdrawal was eventually introduced as Article I-60.

[42] European Convention Secretariat Summary Report of the Plenary Session, Brussels, 24 and 25 April 2003, Document CONV 696/03 dated 30 April 2003, in https://web.archive.org/web/20070731083430/http:/register.consilium.eu.int/pdf/en/03/cv00/cv00696en03.pdf.

[43] See European Convention Secretariat Summary sheet of proposals for amendments concerning Union membership: Draft Articles relating to Title X of Part One (Articles 43 to 46*),* Document CONV 672/03 dated 14 April 2003, in http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00672.en03.pdf.

[44] The original, in German, stipulates in paragraph 2 second point that "*Der Widerruf der Austrittsabsicht kann jederzeit durch Erklärung gegenüber dem Präsidenten des Europäischen Rates erfolgen*. " Amendment 35 to article 46 of the draft Constitution, in http://ec.europa.eu/dorie/fileDownload.do?docId=90025&cardId=90025.

[45] Dammann J., 'Revoking Brexit: Can Member States Rescind Their Declaration of Withdrawal from the European Union?', *Columbia Journal of European Law, Vol. 23*, Issue 2, in http://cjel.law.columbia.edu/preliminary-reference/2017/revoking-brexit-can-member-states-rescind-their-declaration-of-withdrawal-from-the-european-union/.

[46] It was simply stated that "*title VI (former Title VIII of the existing TEU) will be amended as agreed in the 2004 IGC. There will in particular be [...] an Article on voluntary withdrawal from the Union*...". See, 'ICG 2007 Mandate' Council of the European Union document 11222/2007 POLGEN 75 (dated 26 June 2007), in http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011218%202007%20INIT.

Article 50 TEU, Friel[47] considers that the right to revoke a withdrawal notification is inherent in the withdrawal model provided by Article 50 and that, as a consequence, "*at any stage the withdrawing State could withdraw the withdrawal, provided it does so before two years have elapsed*".[48] Friel is critical of the system foreseen in Article 50 which he considers to be "*embarrassing and overly generous to larger States*" because he recognizes that a withdrawal notification or even "*whispered comments*" to this effect could be used by larger Member States "*more readily and credibly [...] as a tactic to bully the Union*"; nevertheless, he concludes that the design of this article which he qualifies as "*unilaterally delayed withdrawal*" means that "*as a matter of common sense, it should be open to a Member State to change its mind within the two-year period*" and that it would be "*perverse*" not to allow this.[49] Łazowski, in a side comment and without further explanation, finds possible that "*one can easily imagine a scenario whereby a Member State triggers the art. 50 TEU procedure, but changes its mind in the course of negotiations (for instance as a result of change of government) and decides to stay in the European Union*".[50]

J-V. Louis, on the other hand, contrary to Friel, considers that the notification of withdrawal cannot be revoked.[51] His arguments are, curiously, similar to Friel's - he also fears that a right to revoke the withdrawal intention would allow, in particular larger states, to "*blackmail or intimidate*" the Union, but his conclusion is diverging from Friel's.[52]

Steve Peers, writing before the Brexit developments but having already in mind a possible UK referendum on the country's withdrawal from the EU, reached the same conclusion, in 2014: although he recognises that "*in the absence of explicit wording, the point is arguable either way*" he concludes nevertheless that "*the notification of withdrawal can't be rescinded*".[53]

47 Friel, R-J., ,'Secession from the European Union: Checking out of the Proverbial Cockroach Motel', *Fordham International Law Journal*, Vol. 27, Issue 2, January 2004, pp. 590-641.
48 Ibid. p. 638.
49 Ibid. pp. 637-38.
50 Łazowski A, 'Withdrawal from the European Union and alternatives to membership', *European Law Review*, Vol. 37(5), 2012, pp. 523-540, in footnote 30.
51 Louis J. V., 'Le droit de retrait de l'Union européenne', *Cahiers de droit européen*, Vol. 42, Nº 3-4, 2006, pp. 293-314.
52 Ibid. p.308. As he points out "*pour éviter des initiatives intempestives de retrait, participant à des tentatives de chantage et d'intimidation, surtout de la part de grands Etats, qu'il faut refuser la possibilité de retirer l'intention de retrait*''.
53 Peers S., 'Article 50 TEU: The uses and abuses of the process of withdrawing from the EU', EU law Analysis blog, 8 September 2014, in http://eulawanalysis.blogspot.be/2014/12/article-50-teu-uses-and-abuses-of.html. Peers also considers that an indefinite extension of the 2-year deadline by common accord between the EU and the withdrawing state in order to circumvent the withdrawal provisions is against "the logic and context of Article 50 [which] suggests that extensions of the time limit are temporary".

4. THE REVOCATION OF THE BREXIT NOTIFICATION

The possibility to revoke the withdrawal notification under Article 50 came to prominence after the June 2016 referendum and in particular following the official notification by the UK government of its intention to withdraw from the EU. The debate, to a large extent, concentrates on the right of the UK government to revoke its withdrawal notification and by this, implicitly or expressly, its intention to withdraw (through a second referendum in the UK or even by an Act of Parliament). As a result of such renewed interest, a significant number of recent publications and studies have dealt with the matter. [54]

4.1. The arguments in favour and against revocability

Given the fact that Article 50 does not make any reference to revocation issues, both sides of the argument can be defended. **The arguments in favour of revocability can be grouped as follows**:

- The first group of arguments is based on the **application *mutatis mutandis* of the relevant provisions of the Vienna Convention**. These arguments seek to apply Article 68 VCLT (and/or Articles 31 and 31 on rules for the interpretation of the treaties) as supplementing the provisions of Article 50.
- Another group of arguments deduces **an implicit right of revocation from the absence of an explicit contrary provision in the treaty**. This argument is sustained, among others, by Sir John Kerr, Secretary-General of the Convention for the future of Europe[55] on the basis of an authentic interpretation of the original provision as well as by the experts invited by the House of Lords in the 2016 hearing on Brexit[56] with the assertion that "there is nothing in Article 50 formally to prevent a Member State from reversing its decision to withdraw in the course of the negotiations".[57]

[54] A, by all means not exhaustive list includes Craig, P. 'Brexit: A Drama in Six Acts',in https://login.westlaw.co.uk/maf/wluk/app/document?access-method=toc&src=toce&docguid=I5FA346E0640C11E686DDDC313F4E3032&crumb-action=append&context=16; De Cecco, F., 'Miller, Article 50 'Revocability and the Question of Control', in https://ukconstitutionallaw.org/2016/11/17/francesco-de-cecco-miller-article-50-revocability-and-the-question-of-control/ ; Dashwood A., 'Revoking Article 50', in https://infacts.org/revoking-article-50/, Duff, A., 'After Brexit' *in* http://policynetwork.org/publication/after-brexit/; Eeckhout P. and Frantziou E., 'Brexit and Article 50 TEU: A Constitutionalist Reading', in http://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2017058; Sari A., 'Reversing a withdrawal notification under Article 50 TEU: Can a Member State change its mind?', in https://login.westlaw.co.uk/maf/wluk/app/document?accessmethod=toc&src=toce&docguid=I51307C0080D911E796E8C62ED923AEC9&crumb-action=append&context=20 ; Smismans S., 'About the Revocability of Withdrawal: Why the EU (law) Interpretation of Article 50 Matters,', in https://ukconstitutionallaw.org/2016/11/29/stijn-smismans-about-the-revocability-of-withdrawal-why-the-eu-law-interpretation-of-article-50-matters/ who argue for the possibility of revocation. On the other hand, Barber N., Hickman T. and King, J., 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', in https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/ ; Eden, P., 'Can a notification under Article 50 TEU be unilaterally withdrawn?' op.cit., MacAmhlaigh C, 'Can Brexit be stopped under EU law?', in https://ukconstitutionallaw.org/2017/10/10/cormac-mac-amhlaigh-can-brexit-be-stopped-under-eu-law/; Rickford, J. and. Ayling R., 'Brexit Referendum and Article 50 of the Treaty on European Union - A Legal Trap: The Need for Legislation' , in https://www.lse.ac.uk/collections/law/news/rickfordayling.pdf and Rylatt J., 'The Irrevocability of an Article 50 Notification: Lex Specialis and the Irrelevance of the Purported Customary Right to Unilaterally Revoke', in https://ukconstitutionallaw.org/2016/07/27/jake-rylatt-the-irrevocability-of-an-article-50-notification-lex-specialis-and-the-irrelevance-of-the-purported-customary-right-to-unilaterally-revoke/ argue against a right of revocation.

[55] See for instance, Piris, J.C., former Director-General of the Council's Legal Service, in https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926 and Sir Kerr J., Secretary-General of the Convention for the future of Europe , in http://www.bbc.com/news/uk-scotland-scotland-politics-37852628

[56] See below in point 4.3.

[57] House of Lords European Union Select Committee 'The process of withdrawing from the European Union', 11th report of session 2015-6 *HL*, 4 May 2016, p. 138, in https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/138/138.pdf.

- A third line, which can be described as a 'teleological' one, interprets Article 50 **in the context of the more general objectives of the Treaty**, among others to establish an 'ever closer Union' and in this context to help States remain within the Union.
- A side argument to this latter point maintains that, if the UK decided to change its mind, its notification under Article 50 **would no longer be compliant with Article 50 (1)** which provides that a state can withdraw "*in accordance with the [UK's] own constitutional requirements*" and the notification would therefore be invalid.
- A final argument is also put forward by former MEP, Andrew Duff, who supports, in addition to other arguments, that the EU is based on a common law culture of '**what is not prohibited under the Treaties is therefore permissible'**.

The arguments against the right of revocation are either legal or political:

- The legal argument maintains that the absence of a specific reference in the Treaty of the right to revoke should not lead to the assumption that a revocation is allowed, unless the opposite can be inferred by the context. This line supports that there is no such inference in that specific Article on a right to revoke a notification and therefore the possibility to revoke cannot be assumed.
- In addition, the same legal argument maintains that Article 50 is a succinct but complete provision which describes the entire withdrawal process. Under this reading, the withdrawing state which wishes to maintain its links with the EU has two alternatives: either to request for the (unanimously agreed) prolongation of the two-year period or to reapply for membership. This argument claims, therefore that the Treaty has covered the eventuality of a change of mind of the withdrawing state and provided, as a solution to this, the possibility of a new application.[58]
- The political argument – or more adequately, the "moral hazard" argument – relates to a risk already outlined during the negotiations of the Article in the Convention for the Future of Europe, namely that a possible right to revoke a withdrawal notification would alter the nature of the Article and could become a means of a blackmail by any Member State which could use notifications and revocations successively in order to reinforce its bargaining capacity.

4.2. Revocation under the courts' scrutiny

The question of the revocability appeared as an incidental question before UK courts in relation to the *Miller and others* case. The applicants in this case had requested, in 2016 and early 2017, the UK courts to oblige the UK government to seek the approval of the Parliament before submitting the withdrawal notification. The High Court in its ruling on the matter acknowledged that it was "*common ground between the parties*" that "*a notice under article 50 (2) cannot be withdrawn once it is given*" and that "*once a notice is given, it will result inevitably to the withdrawal of the UK from the EU".*[59] The UK Supreme Court, following the UK government's appeal against the High Court decision, confirmed, again in passing, this position. The Court ruled that "*in these proceedings, it is common ground that notice under article 50(2) [...TEU] cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn*" although it recognised that even if this were not so "*it would make no difference to the outcome of these proceedings"*. It concluded that it would "*proceed on*

[58] Łazowski also points out that Article 50 should be understood in a very narrow way so that only the mere decision to withdraw ("Any Member State may decide") lies within the free choice of the Member State, whereas the details of a withdrawal and its procedure have to be set by the EU in its totality.
[59] Points 10 and 11 of the ruling, C-3809/2016 and 3281/2016. Miller et al. vs. Secretary of State for Exiting the EU, Judgment of 3 November 2016, in https://www.judiciary.gov.uk/wp-content/uploads/2016/11/r-miller-v-secretary-of-state-for-exiting-eu-amended-20161122.pdf.

the basis that that is correct, without expressing any view of our own on either point".[60] Before the Supreme Court's decision, it was expected (or hoped) that the Supreme Court might have referred the matter to the CJEU for clarification through a preliminary ruling. However, the Supreme Court, as with the High Court earlier, concentrated only on the issue of the UK Parliament's consultation.

Another attempt to seek clarification from the CJEU on the revocability of Article 50 was made early in 2017 in Ireland before the Irish courts. A number of UK lawyers and anti-Brexit activists seized the Irish High Court in Dublin with the objective to have the CJEU rule as to whether the official notification under Article 50 that the UK is leaving the EU can be withdrawn by the UK once it has been invoked. [61] The Irish government opposed the move as it did not wish Ireland to get involved in a UK domestic issue and, eventually, the Irish High Court struck out the case at the request of both Ireland and the plaintiffs. It is of course questionable whether the CJEU would respond to a hypothetical question.[62]

4.3. The position of the institutions

Although this question is eminently a matter of interpretation, UK and the EU institutions have taken position, albeit carefully, on the matter.

The UK Parliament had discussed the question of the revocability of Article 50 TEU even before the June 2016 referendum. In a hearing held by the House of Lords European Union Committee in May 2016[63], the experts invited, Sir David Edward, former Judge in the CJEU and Professor Derrick Wyatt, both supported that a "*Member State could legally reverse a decision to withdraw from the EU at any point before the date on which the withdrawal agreement took effect*"[64] and that "*there is nothing in the wording [or article 50] to say that you cannot. It is in accord with the general aims of the treaties that people stay in rather than rush out of the exit door*" although they both agreed that "*the politics of it would be completely different*".[65]

Following the referendum, a written question was submitted by a member of the House of Lords asking whether the UK government had "*taken legal advice on whether the UK can revoke the triggering of Article 50*". The government in its answer avoided a direct reply as to the legal advice but stated that "*there is no precedent for a country triggering Article 50, let alone seeking to reverse such a decision. As a matter of firm policy, our notification will*

[60] Point 26, Judgment R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review reference by the Court of Appeal (Northern Ireland) – In the matter of an application by McCord R for Judicial Review, Judgment of 24 January 2017. *Hilary Term [2017] UKSC 5 On appeals from: [2016] EWHC 2768 (Admin) and [2016] NIQB 85*, in https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf.

[61] 'Lawyers aim for fresh legal challenge to Brexit process in Dublin', *Financial Times,* 9 December 2016, in https://www.ft.com/content/a271c0a2-be2d-11e6-8b45-b8b81dd5d080. There was a second legal question regarding whether the notification also covered withdrawal of the UK from the EEA.

[62] See, inter alia, Case C-197/10 *Unió de Pagesos de Catalunya v. Administración del Estado* (Reference for a preliminary ruling from the Tribunal Supremo) [2011] ECR I-8495 paragraph 18 "the Court's function in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions" as well as Cases C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 32, C-478/07 *Budějovický Budvar* [2009] ECR I-7721, paragraph 64 and C-384/08 *Attanasio Group*[2010] ECR I-2055, paragraph 28).

[63] House of Lords European Union Committee, 'The process of withdrawing from the European Union', op. cit.

[64] Ibid. p. 4.

[65] Ibid. p. 4. It should be noted that several questions on the matter referred to the issue of maintaining the UK rebate and the opt-outs, following a hypothetical revocation. Both experts were more hesitant on a possible return to the status quo ante with Sir Edward stating that "I am saying that they [the 27] might say, "We will let you change your mind, but there will be no more opt-outs". (See transcript of the oral evidence, in http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/oral/30396.html)

not be withdrawn - for the simple reason that people voted to leave".[66] However, it appears that the UK government has taken advice as to the reversibility of the notification: at the time of the writing, there is an ongoing legal challenge by a UK lawyer who under the Freedom of Information Act requested the Prime Minister to make public the legal advice it has sought on this matter.[67]

During her presentation in the House of Commons, on 9 October 2017, on the progress of the negotiations, Prime Minister May was asked three times[68] about the advice the government had requested on the possible revocation of the notification under Article 50. After initially replying that "*the Government have made it clear that we have no intention of revoking that*" and that the "*position in relation to the revocation of article 50 was addressed by the Supreme Court [in the Miller case]*" she conceded in the end that the "*Supreme Court [...] proceeded on the basis that article 50 would not be revoked*" without explaining the government's position or advice it had received.[69]

The European Parliament has taken the position that a hypothetical revocation should be some form of multilateral act and include conditions set by the remaining Member States. In its first resolution on Brexit, on 5 April 2017, the Parliament included a paragraph that suggests that the revocation of the notification is possible - although it should be "*subject to conditions set by all EU-27"*.[70]

Before the UK withdrawal notification, a UK MEP, Raymond Finch (EFDD) raised the issue in the European Parliament through identical written questions addressed to the Council and to the Commission.[71] There are interesting differences in the (very laconic) replies given by the two institutions. While the Commission stated that "*The Treaty does not provide a mechanism for a unilateral withdrawal of a notification under Article 50 [...] TEU. Once the article 50 TEU is triggered,* ***it is no longer a unilateral process***" (*emphasis added*), [72] the Council preferred to simply affirm that "*under Article 50 (2) TEU, a Member State which decides to withdraw from the Union is to notify the European Council of its intention. It is worth noting that* ***it is not for the Council to provide legal analysis***" (*emphasis added*)[73] The Commission seems to maintain that a decision to revoke is feasible, albeit not unilaterally. In a July 2017 fact sheet on the State of play of the Brexit negotiations, it repeats that "*it was the decision of the United Kingdom to trigger Article 50. But once triggered, it cannot be*

[66] House of Lords, written question HL1047, asked by Lord Myners, 19 July 2017, answered by the Department for Exiting the European Union on 31 July 2017, in http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-07-19/HL1047/

[67] Simor, J., 'Why it's not too late to step back from the Brexit brink', *The Guardian,* 7 October 2017, in https://www.theguardian.com/commentisfree/2017/oct/07/why-its-not-too-late-to-step-back-from-brexit. Simor affirms that she has been told by "two good sources" that the advice is "that the notification can be withdrawn by the UK at any time before 29 March 2019 resulting in the UK remaining in the EU on its current favourable terms".

[68] Respectively by Labour MPs Ben Bradshaw, Chris Leslie and Helen Goodman.

[69] House of Commons, Hansard, Debates of 9 October 2017, Volume 629, Columns 51 and 60, in http://hansard.parliament.uk/Commons/2017-10-09/debates/B119A163-5708-4B76-847A-0F8AFE4CD5F9/UKPlansForLeavingTheEU#contribution-5F06D7ED-6DD7-4BF6-8354-E10257BCD6B3

[70] See European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (point L). A similar approach is taken in the European Parliament Research Service (EPRS) in-depth analysis *UK withdrawal from the European Union - Legal and procedural issues* (by Carmona J, Cîrlig C C and Gianluca S), March 2017, pp. 9-10 which concludes that "*there is wide agreement that the withdrawal process could be suspended if all the other Member States agree to this, as the Member States are the 'masters of the Treaties'*" but considers "*much more problematic*" a unilateral revocation, in http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/599352/EPRS_IDA%282017%29599352_EN.pdf.

[71] The content of both questions was the same: "Can notice under Article 50 of the Treaty on European Union be revoked? If so, what is the process or procedure by which such revocation can be effected?" Question for written answer to the Council under Rule 130 (reference E-008604/2016) and question for written answer to the Commission under Rule 130 (ReferenceP-008603/2016), both dated 16-November 2016.

[72] Commission reply, 18 January 2016, in http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-008603&language=EN.

[73] Council reply, 25 January 2017, in http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2016-008604&language=EN.

unilaterally reversed. Article 50 does not provide for the unilateral withdrawal of the notification".[74] Michel Barnier has also been quoted to state that "*the UK could not stop Brexit unilaterally*" and that "*overturning the decision to leave would require the consent of 27 EU member states*".[75]

4.4. An attempt to interpret Article 50

Any effort to discuss the possibility of revoking a notification under Article 50 should take into account the context within which it was adopted, the intention of its drafters and the objectives and scope of the provision (as Article 31 VCLT provides and the CJEU has accepted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"). From this point of view, EU law and doctrine and CJEU here are of a limited assistance given both that the Article is relatively recent and that there has not been any previous attempt to interpret it.

As stated above, an 'authentic' or 'historic' interpretation of Article 50 (using the supplementary means of interpretation, including "the preparatory work" and the circumstances of the conclusion as per Article 32 VCLT), cannot provide a firm reply. As shown above, the discussions in the Convention on the Future of Europe (which are public and can be consulted) do not enlighten as to the intentions of the drafters. The issue of a right to revocation was not discussed there, the main issues being the suitability and conditions of the withdrawal. The only reference to revocation was rejected and it does not seem that the question was ever discussed or even considered.

Though it is true that the *telos* of the EU is to achieve "an ever closer union" it is difficult to conclude, from this, that Article 50 can be construed as to intend to facilitate remaining in the EU[76] and therefore, indirectly, to allow for the revocation of a notification of withdrawal. The CJEU, through an exercise of 'judicial activism' in particular in the early EEC period, has indeed assumed a number of principles in the functioning of the integration process that found no direct mention in the founding treaties, generally favouring integration[77]. However there is a significant difference in the case of Article 50: this article has been established as an aberration to the general economy of the Treaties – it is the only provision that allows for a withdrawal and thus avowedly is in contradiction with the spirit of the Treaties. In this context, the Court could be more reluctant to assume that the Article should be interpreted as favouring integration and thereby allowing a right to a revocation which is not present in the text: it could equally apply the principle that the silence of law implies the absence of the right *('ubi lex voluit dixit, ubi noluit tacuit').*

The argument that a decision to revoke a notification would render void the prerequisite under Article 50 (1) which provides that "a Member State may decide to withdraw from the Union in accordance with its own constitutional requirements" merits particular attention. Presumably, the change of mind of the withdrawing state would take place through some form of domestic constitutional arrangement (in the UK case, either by a new referendum or a relevant decision of the UK Parliament, or both). However, this paragraph is more viewed

[74] European Commission fact sheet on 'the State of play of Article 50 negotiations with the United Kingdom', Brussels, 12 July 2017, in http://europa.eu/rapid/press-release_MEMO-17-2001_en.htm.
[75] 'UK cannot have a special deal for the City, says EU's Brexit negotiator', *The Guardian*, 18 December 2017, in https://www.theguardian.com/politics/2017/dec/18/uk-cannot-have-a-special-deal-for-the-city-says-eu-brexit-negotiator-barnier#img-1.
[76] This is the approach suggested by Smismans relating to an "EU (interest) interpretation" of Article 50. See Smismans, S., 'About the Revocability of Withdrawal: Why the EU (law) Interpretation of Article 50 Matters' op. cit.
[77] On the limits of such an 'in-built communautaire tendency' in the legal reasoning of the CJEU see Beck, G. "the Legal Reasoning of the Court of Justice of the EU", Modern Studies in European Law, Hart Publishing, Oxford and Portland, 2012, in particular pages 325-329.

as a 'formal compliance'[78] rather than a condition: in a Member State where rule of law prevails, such a decision will, in principle, be taken following an orderly discussion and a lawful national decision. If the respect of a country's "constitutional requirements" were to be examined in substance by the EU (and, in this case, it would be debatable by which institution of the EU) before starting the negotiation process, this would be tantamount to granting the EU a right of scrutiny over a state's domestic form of decision-taking, in a manner reminding that of a federal system which could not be in line with the Treaties.[79] Such a margin of appreciation for the EU could, for instance, lead to the EU deciding that a referendum may not be "in accordance with [a state's] constitutional requirements" because it did not pass a sufficient threshold or because the EU was not allowed to intervene in the relevant debate (both of which were the case in the UK referendum). As Closa argues "to argue that a new government may change the decision of a previous one during this period to justify this interpretation places the interpretation of EU rules at the disposal of domestic political disputes".[80] In any case, as also pointed out "it is not the decision to withdraw that starts the withdrawal process, but the *notification* of such a decision". As the withdrawal procedure starts once the decision has been notified, a "subsequent change in the national decision does not affect the previous notification and, consequently, cannot stop the withdrawal procedure".[81] A subsequent national decision to revoke the notification would not, thus, be relevant under EU law.

A powerful argument against the right of revocation is that the withdrawal notification sets in place a series of actions that would end with the withdrawal. Contrary to the withdrawal from international treaties in general, where withdrawal is a 'one-off' action, under Article 50, notification already has legal effects:[82] the European Council adopts its guidelines, the Commission sets up a negotiating team and proposes arrangements for the withdrawal negotiations and even the withdrawing Member State suffers a '*diminutio capitis'* in the form of not being allowed to participate in the relevant discussions in the European Council and in the Council. It is not fully accurate, therefore, to consider that withdrawal takes effect only upon the conclusion of the withdrawal agreement (or, in its absence, two years after notification). Contrary to other similar cases under international law, under Article 50 legal effects start already with the notification rather than with the conclusion of the withdrawal process.

From the above, it is clear that Article 50 cannot authoritatively be interpreted to allow or prohibit the right of an EU Member State to notify its decision to withdraw from the EU and later, revoke it. There are well-founded arguments in favour or against such a reading of Article 50. However, these analyses represent diverging readings of the provisions of the Treaty and cannot be construed to reflect the Treaty content itself. A unilateral revocation or even a revocation with the agreement of all, or most, other Member States would be in fact an interpretation of the Treaty provisions made by international law subjects which are not authorised, under the EU Treaty to interpret it. Such an attempt could imply, or lead to, a

[78] Hillion C., 'Leaving the European Union, the Union way - A legal analysis of Article 50 TEU', *SIEPS (Swedish Institute for European Policy Studies), European Policy Analysis*, August 2016:8.
[79] To this end see for instance the German Constitutional Court's Lisbon Judgment where it states that "*Article 50.1 Lisbon TEU merely sets out that the withdrawal of the Member State must take place "in accordance with its own constitutional requirements". Whether these requirements have been complied with in the individual case can, however, only be verified by the Member State itself, not by the European Union or the other Member States*". Judgment of 30 June 2009 - 2 BvE 2/08, point 330, in https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.
[80] Closa C., 'Interpreting Article 50: exit and voice and…what about loyalty?', *EUI Working Paper,* RSCAS 2016/71, p. 7.
[81] Gatti, M., ''The Article 50 Procedure for Withdrawal from the EU: A Well-Designed Secession Clause'. Paper presented at the EU Studies Association (EUSA) Conference, Miami, 4-6 May 2017. Panel 3I – *Brexit: Impact upon European Law and Integration,* in *https://www.eustudies.org/conference/papers/download/431. p. 10.*
[82] Hillion C., 'Leaving the European Union...' op. cit. p. 5.

tacit amendment of the Treaties – adding to Article 50 TEU a provision which is not there and which would allow the revocation of a withdrawal notification without passing from the formal procedure of a Treaty modification. Instead, any consideration to allow or accept a revocation of a withdrawal notification should be deemed to be a request to interpret the provisions of Article 50 in relation to a withdrawing State's right to revoke its notification. The only institution competent under the Treaties to interpret them is the CJEU. From a political point of view, it is true that it would be very difficult for a judicial institution to reject an (even preliminary) agreement between all Member States that would consent to the UK revoking its withdrawal notice. From a legal point of view, though, it could be viewed as a requirement for upholding rule of law in the EU and for providing legal certainly in relations among and between Member States and EU institutions. It is assumed that, in its interpretation (or in a judgement as to the legality of the revocation notice), the CJEU would take into account all relevant aspects (the historical context of the adoption of Article 50, the teleological reading of the Treaties, the content of the provisions themselves and the legal context of the withdrawal and the revocation). Obviously such an interpretation by the CJEU would be valid for all (hopefully no other) future withdrawals, settling the matter henceforth.

5. SUBSIDIARY ISSUES

The debate on the general issue of the right to revoke a withdrawal notification includes several subsidiary, but not for this reason minor, issues. They are, to a large extent, dependent on the prior admissibility of a right to revoke but for the sake of completeness it is worth delving for a while in these questions, which have a significant legal and political interest.

5.1. Can a revocation be made unilaterally?

The first such question is the form of the revocation. If we admit that there is a right to revoke the withdrawal notification before withdrawal takes effect, a further issue arises: Can such a revocation constitute a unilateral act of the withdrawing state (in this case, the UK) or should it require the agreement of the remaining (or of a qualified majority of) Member States? Those who support that revocation is feasible are divided on the issue.

Among UK scholars and politicians there is a predominant position that a unilateral revocation is within the right of the UK.[83] As pointed out above in point 4.3, the House of Lords has taken a position in favour of UK's unilateral right to revoke. This is a position which is also defended by the 'Three Knights' Opinion' which suggests that Article 50 allows a "*Member State unilaterally to withdraw a notification that it has given, prior to the end of the two-year negotiating period, for example if its constitutional requirements for leaving have not been satisfied, if there is a material change in circumstances, or if it is unable to negotiate acceptable terms for withdrawal and wishes to remain*".[84] Jean-Claude Piris also sides with the unilateral right to revoke and states "*if the intention to leave was withdrawn, the process would be interrupted and the status quo ante would prevail*".[85]

Outside the UK, the relatively limited discussion on the revocability tends to view such revocation as a collective decision of Member States, rather than a unilateral one by the UK.[86] The European Parliament in its resolution of 5 April 2017, cited above, appears to take the position that a hypothetical revocation should take place following a multilateral agreement and even include conditions set by the remaining Member States. The Parliament highlighted that "*a revocation of notification needs to be subject to conditions set by all EU-27, so that it cannot be used as a procedural device or abused in an attempt to improve on the current terms of the United Kingdom's membership*".[87] The EP Brexit coordinator, Guy Verhofstadt, has also declared that the door for the UK would remain open if it changed its mind but that "*it will be a brand new door with a new Europe: a Europe without rebates, without complexity, with real power and with unity".*[88]

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[83] Besides the House of Lords and the 'Three Knights' Opinion', this is the position supported by Sir Kerr, J. as well as Allott, P., 'Taking Stock of the Legal Fallout from the EU (Notification of Withdrawal) Act 2017', U.K. Const. L. Blog, 2 February 2017, in https://ukconstitutionallaw.org/2017/02/02/philip-allott-taking-stock-of-the-legal-fallout-from-the-eu-notification-of-withdrawal-act-2017/). On the other hand, Dashwood, (op. cit.) and De Cecco, (op. cit.) support that revocation is possible following a negotiated agreement to revoke.

[84] 'In the matter of Article 50 TEU' op. cit. p. 18.

[85] Piris J-C, 'Article 50 is not for ever and the UK could change its mind', *Financial Times*, 1 September 2016, in https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926.

[86] See, for instance, Dehousse, F., '*Can the British Brexit notification be withdrawn*?' Egmont Royal Institute for International Relations, Commentaries, 21 April 2017, in http://www.egmontinstitute.be/can-the-british-brexit-notification-be-withdrawn/ who, though expressing uncertainly over the right of revocation in general concludes that "If a simple postponement [of the two-year negotiation period] requires unanimity, [...] a fortiori even more essential changes (including the notification's withdrawal) also require unanimity" using the metaphor that "once you officially get on the train, you go to the final destination – except if everybody agrees to stop the train".

[87] See point L, resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union.

[88] European Parliament, *Debate on the preparation of the European Council of 22 and 23 June 20*17, 14 June 2017, in http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20170614+ITEM-%20005+DOC+XML+V0//EN&language=en&query=INTERV&detail=3-018-000

Again, this issue remains a matter of interpretation. As discussed above, this analysis considers that the VCLT rules for revocation are not applicable in this process. If, nonetheless, revocation were to be accepted on the basis of a complementary application of the relevant VCLT provisions as a customary rule of international law and Article 68 VCLT were to apply as a supplementary rule to Article 50 TEU, revocation would be a unilateral act: it would simply imply a change of mind of the state concerned and would not need any form of consent of the remaining State Parties to the TEU. It has to be recalled, in this context, that, during the preparatory works of the VCLT, some concerns over the unilateral character of the revocation were expressed but ultimately set aside.[89]

Under this reading, a hypothetical decision of the UK to revoke its notification, based on the VCLT, would not require the consent of other Member States.

The argument against this reading is, again, centred on the particular form of the withdrawal process provided for in the TEU as well as the conditions and requirements of membership in the EU. In the first place, the withdrawal process is a process that requires the active involvement of all EU institutions, not of the withdrawing state only. As such, the process cannot be interrupted or reversed by a decision of that state alone. In addition, the process and the implications of joining the EU are different from those of joining other international treaties. Joining and being a member of the EU is a much further-reaching commitment, where international law cannot be simply construed to apply in an analogous manner. This is the reason why the process of withdrawing (and the revocation thereof) cannot be moulded as under international law.

From a political point of view, it seems implausible that the UK would unilaterally decide to revoke its notification and simply go on with 'a business as usual' approach. Such a unilateral act would create a major institutional crisis within the EU and could arguably be considered to violate the principle of sincere cooperation between Member States. A more likely (from a legal at least point of view) scenario would be, following formal or informal contacts with other Member States and EU institutions, a decision allowing for a concerted rescinding of the withdrawal notification. Under such a scenario, it seems unlikely that the specific conditions of UK membership (in particular its financial contribution to the EU budget, including the British rebate, and its rights to opt-out from certain policies) could be altered. In addition to the fact that the legal basis for these provisions is to be found in the Treaty[90] which can only be amended unanimously (including the UK) and following the procedure for the revision of the Treaty provided in Article 48 TEU (in the case of the British rebate, the legal basis in a Council decision[91] that also requires unanimity to be modified), it would be politically untenable for any UK government to accept a humiliation in the form of giving up certain rights that in now enjoys in exchange for staying in the EU.

[89] The Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session to the General Assembly (*Document A/6309/Rev. I)* referring to the (then) article 64 mentioned that "*several Governments had questioned the desirability of stating the rule [or revocation] in a form which admitted a complete liberty to revoke a notice*" prior to the moment of its taking effect, but that in the event it concluded that the considerations "*militating in favour of encouraging the revocation [...] are so strong that the general rule should admit a general freedom to do so*", ILC commentary to article 64, YILC 1966, Vol. II. p. 264, in http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf.

[90] In particular, Protocol (No 15) on 'certain provisions relating to the United Kingdom of Great Britain and Northern Ireland', as regards UK's participation in the Monetary Union, Protocol (No 20) on 'the application of certain aspects of Article 26 of the TFEU to Great Britain and to Ireland' and Protocol (No 21) on 'the position of the United Kingdom and Ireland' in respect of the Area of Freedom, Security and Justice.

[91] Council Decision 2014/335/EU of 26 May 2014 on the system of own resources of the European Union, in http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014D0335.

5.2. The role of the CJEU in a possible revocation

The Withdrawal Agreement is an international agreement concluded under EU law. It is not primary law because it is not concluded between Member States but between the EU and the UK and therefore its provisions and content fall under the judicial review of the CJEU,[92] which can even emit an opinion under Article 218 (11) TFEU on its compatibility with the Treaties. [93]

A revocation of a withdrawal notification poses different issues. Just like the notification letter submitted on 29 March 2017 by Prime Minister May, a revocation letter is not an EU act, it is not even a legal act but merely a piece of diplomatic information. There have been legal consequences arising from the notification letter - namely the beginning of the two-year period for the conclusion of the Withdrawal Agreement, but it is not easy to qualify it as a measure intended to produce legal effects. A hypothetical letter of revocation, whether unilateral or collectively decided, would not produce any more legal effects: it would merely bring back the *status quo ante* (and, presumably, explicitly or implicitly overturn the two-year negotiation period). The CJEU is competent to "*ensure that in the interpretation and application of the Treaties the law is observed*" through "*actions brought by a Member State, an institution or a natural or legal person*" or by giving preliminary rulings "*at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions*"[94]. A letter cannot qualify as a legislative act of the UK (it would probably represent the end of a domestic political and legislative process leading to the reversal of the decision to withdraw). The receipt of the revocation letter cannot, on the other hand, be qualified as a legislative act by the European Council (or by its President). Both documents do have legal effects but only indirectly, in the sense that they do not alter the status quo (they do not advance the UK withdrawal process) rather than modify the current situation.

Even in the case of a unilateral revocation, it is difficult to envisage the possible legal paths for the EU. Other Member States or an EU institution can invoke that the revocation constitutes a breach, from the part of the UK, of the principle of sincere cooperation under Article 4 (3) TEU and request from the CJEU that the revocation be annulled or at best negotiated. There is a significant CJEU case law on the application of the principle of sincere cooperation in the EU legal order and it is considered to apply to the general behaviour of a Member State rather than only to legislative acts.[95] However, the scope of this principle is wide and the CJEU considers it subsidiary to more specific Treaty provisions[96] while it has ruled that its tenor "depends in each individual case on the provisions of the Treaty and on the rules derived from its general scheme".[97]

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[92] Among others, the Council decision to conclude the agreement could, for instance, be challenged before the CJEU through an action for annulment under Article 263 TFEU, and EU Member States' courts could request the CJEU to interpret specific provisions of the Withdrawal Agreement through preliminary ruling. See European Parliament Research Service (EPRS): *Article 50 TEU: Withdrawal of a Member State from the EU*. Briefing by Eva-Maria Poptcheva, February 2016. PE 577.971, p. 5 in http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf .

[93] See, in particular, Policy Department for Citizens' Rights and Constitutional Affairs , *The settlement of disputes arising from the UK's withdrawal from the EU.* Study for the AFCO Committee. November 2017, in http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596819/IPOL_STU(2017)596819_EN.pdf, in particular pp. 66-70.

[94] Article 19 TEU.

[95] For an analysis of this principle see, in particular, Klamert, M. 'The Principle of Loyalty in EU Law', Oxford Scholarship Online, April 2014 in http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199683123.001.0001/acprof-9780199683123. See in particular part I 'Introducing Loyalty'.

[96] In 1993, The Court defended that Article 5 EEC (The predecessor of current Article 4) '*is worded so generally that there can be no question of applying it autonomously when the situation concerned is governed by a specific provision of the Treaty*". See case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 18.

[97] ECJ Case 78/70 *Deutsche Grammophon* [1991] ECR 487 paragraph 5.

If such a case arose, it is assumed that the specific Treaty provision would be Article 50 TEU and the obligations of cooperation under it, but it is still doubtful how such an action, presumably under Article 259 TFEU (or under 258 TFEU if the case is brought by the Commission) for failure to fulfil an obligation under the Treaties, could be dealt with by the CJEU.

If the revocation of the notification is agreed between (all) Member States, this possibility is excluded, assuming that the Commission were also implicated in the relevant negotiations and consented to the revocation. In such a case, the only possibility to challenge the revocation letter would be for natural or legal persons (or the European Parliament if it were excluded or disagreed with the revocation agreement) to challenge, under Article 263 TFEU, the legality of any legislative act adopted by the Council with the participation of the UK - but only after the two-year period provided in Article 50 TEU, in the specific case, after 29 March 2019. By that time the participation of the UK in the EU should have ended under the conditions of Article 50 without an agreement and the UK should have left *ipso facto* the EU. In case the European Council (or the Council), following the revocation letter by the UK, takes a decision to freeze or annul the process initiated by the UK's notification of withdrawal Article 50 (it is reminded that it did not take any specific relevant decision following the withdrawal notification), it is possible to immediately challenge the legality of this decision under Article 263 TFEU.

Another immediate possibility would be for a UK national (or indeed any EU citizen) who would feel that his/her rights have been frustrated by the UK government's decision to revoke the withdrawal notification (or by relevant preliminary acts, such as the calling of a second referendum in the UK or a parliamentary vote to that effect) to challenge this decision before a UK court and request that court, if his plea were accepted, to raise the issue of the interpretation of Article 50 insofar as the right of revocation is concerned and request the CJEU to give a preliminary ruling under Article 267 TFEU as to the legality of the withdrawal notification.

6. CONCLUSIONS

It has been accurately pointed out that the "final deal between the EU and the UK will be shaped by power and politics, not by the strict application of legal rules".[98] Nevertheless, the entire withdrawal process has based itself substantially on legal analyses rather than political expediency: both parties have argued their case on legal grounds more than on political priorities. This is true for the UK side and even more so for the EU. As a consequence, even a relatively hypothetical question such as the possibility to revoke a withdrawal decision before it takes effect should be examined under the light of the legal challenge it represents, for EU law as well as public international law, not (only) as a part of a political deal.

Looking at the possibilities under international law first: it has been analysed above that, though the EU is a legal construction under international law, it has developed into *a sui generis* entity whose legal order is an autonomous one, a self-constrained regime that no longer follows international law provisions alone and does not take international law as an analogy for applying it to its *interna corpora*. Indeed, the entire withdrawal process, including its negotiation, is an EU-law-driven process rather than an international law one. The notification of withdrawal is addressed to an EU institution, the European Council, not to the High Contracting Parties that signed the Treaties. The guidelines for the withdrawal negotiations are adopted by another EU institution, the Council of Ministers, and conducted by a third, the European Commission. The involvement of Member States takes place through the EU institutions where they are represented, not through their diplomatic missions. It is EU law which governs the withdrawal agreement. The Council concludes the withdrawal agreement on behalf of the EU; the agreement does not need to be ratified by Member States but only by the withdrawing state and a fourth EU institution, the European Parliament. This is divergent from withdrawal negotiations conducted in the context of other international treaties, where the State Parties are participating in the negotiations and conclude the agreement. This departure from international law is further evidenced in the requirement of a qualified majority in the Council for the conclusion of the agreement, meaning both that withdrawal needs the assent of other EU Member States and that it can be agreed against the will of some of these Member States.

In addition to this, this analysis argued that the VCLT provisions on the revocation of a withdrawal notification are not even applicable in the revocation of a withdrawal notification in the EU context and under the EU law, for several reasons but largely as they refer to totally different legal situations than the one described in Article 50 TEU. As a consequence, the VCLT provisions on revocation could not apply in the case under Article 50 TEU.

This does not, of course, mean that Member States, as the masters of the Treaty, cannot decide otherwise. However, such a decision must be taken explicitly and follow the relevant TEU provisions for Treaty modification, rather than a decision to unilaterally or collectively apply the VCLT provisions.

It remains to examine the possibilities for revocation under EU law: given that Article 50 cannot authoritatively be interpreted as to allow or prohibit the right to revoke a withdrawal notification, such revocation whether decided unilaterally or in agreement among Member States, could be seen to usurp the CJEU's exclusive right to interpret the Treaty.

The assumption that there is a self-affirmed right of Member States to interpret the silence of the Treaty in the matter and conclude that the UK (or any) notification of withdrawal under Article 50 can be revoked would have long-lasting political and legal consequences for the EU. As stated above, it is clear that the Member States are the masters of the treaties; however, such mastery should take place within the legal framework established by the

[98] Jed Odermatt op. cit. p. 1053.

treaties. It has already been claimed that the introduction of Article 50 in the Treaty has altered fundamentally the nature of the Union; the affirmation that Member States could interpret at will the Treaty might have even more long-lasting consequences. For this purpose, a hypothetical right of revocation could only be examined and confirmed or infirmed by the EU institution competent to this purpose, namely the CJEU.

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This in-depth analysis examines the issue of the possible revocation of a withdrawal notification under article 50 TEU. In light of the ongoing negotiations on the UK's withdrawal from the EU, the possibility for the UK to revoke its withdrawal notification has become a significant political and legal/institutional issue. The analysis examines the case of revocation of a withdrawal notification under international law and under the EU law and assesses the various positions expressed so far on the matter.

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