systematically precluded such a possibility, thus re-enforcing the increasing recognition of horizontal direct effect of certain Charter provisions.

*Bauer* is a significant judgment for the protection of social rights, *in casu* the right to paid annual leave. The Court emphasised that the right to paid annual leave constituted an essential principle of EU social law derived from a number of legal instruments both under EU law and international law. It seems that the importance of this social right was yet another reason to recognise its horizontal direct effect, in addition to its self-sufficient nature. AG Bot called for a strengthened enforceability of fundamental social rights in disputes between individuals.

The judgment’s strength, however, was also its weakness. By emphasising the distinctiveness of the social right under consideration, the Court cast gloom over its reassuring tone that the Charter was, overall, capable of direct enforcement in disputes between individuals. This was also borne out by the Opinion of AG Bot, which hinted to the difference between principles and rights recognised by the Charter, the former having more limited and indirect enforceability. Unfortunately, he did not engage in a further analysis of the difference between these two types of Charter provisions because it was indisputable that *Bauer* dealt with the effect of a right.

In short, this case provided a strong affirmation that the Court is moving towards recognising horizontal direct effect of EU fundamental rights. The judgment did not, however, fully resolve the conundrum of the enforceability of the Charter. By emphasising that *Bauer* was about an essential social right, the Court left ambiguity as to which Charter provisions are special – and thus worthy of a higher degree of enforceability – and which ones are not.

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THE RIGHT TO REVOKE AN EU WITHDRAWAL NOTIFICATION: PUTTING THE BULLET BACK IN THE ARTICLE 50 CHAMBER?

THE judgment of the Court of Justice of the European Union in *Wightman and Others v Secretary of State for Exiting the European Union*, Case C-621/18, EU:C:2018:999, that a Member State of the EU may unilaterally revoke a notified intention to withdraw from the EU, settled a legal question that had been posed ever since the UK gave notice of its intention to leave the EU in terms of Article 50 of the Treaty on European Union (TEU). *R. (Miller) v Secretary of State for Exiting the European Union (Birnie and others intervening)* [2017] UKSC 5, [2017] 2 W.L.R. 583 (see D. Feldman [2017] C.L.J. 217), had proceeded on the agreed assumption
that an Article 50 TEU notification could not be revoked. The legal question was not referred to the Court of Justice for authoritative resolution. The outcome of the reference in *Wightman*, however, was not wholly unexpected, with the balance of legal opinion broadly tending to believe that a right unilaterally to revoke a withdrawal notification was consistent with the unilateral nature of the right to withdraw as provided for in Article 50 TEU.

When the *Wightman* petitioners – members of the Scottish, UK and European parliaments – lodged a petition with the Scottish Court of Session for judicial review on 19 December 2017 with a view to obtaining a reference to the Luxembourg court on the revocation issue, the Lord Ordinary initially determined that the case lacked “a real prospect of success” in terms of section 27B of the Court of Session Act 1988, and permission to proceed was denied: [2018] CSOH 8. After a successful permission appeal to the Inner House of the Court of Session ([2018] CSIH 18), the petitioners faced the challenge of persuading the Court to exercise its supervisory jurisdiction and to determine that a reference to the Court of Justice was necessary and not excluded by the Court of Justice’s own case law on the admissibility of requests from the national courts for a preliminary ruling. In the Outer House ([2018] CSOH 61), the Lord Ordinary ruled that the issues did not raise “a live practical question”, at [49], and were “hypothetical”, at [73]. Nonetheless, the Inner House took a different view: [2018] CSIH 62. It noted that section 13 of the European Union (Withdrawal) Act 2018 gives members of the House of Commons an opportunity to decide whether or not to approve the text of the Withdrawal Agreement and Political Declaration on the future UK-EU relationship negotiated as part of the Article 50 TEU withdrawal process. Whether there was an alternative option of revoking the Article 50 TEU withdrawal notification was, therefore, a matter on which the Scottish court could competently give a declarator, informed by a preliminary ruling from the Court of Justice. With the Inner House rejecting submissions from the UK Government that a declarator would interfere with proceedings in Parliament, the Inner House consented to the request to make a reference to the Court of Justice. On 3 October 2018, the Court of Session referred the following question to the Court of Justice:

Where, in accordance with Article 50 of the Treaty on European Union, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?

Despite the reference having already been sent, the Secretary of State for Exiting the European Union sought permission of the Inner House to
appeal to the Supreme Court against its interlocutory judgment. Both the Inner House and the Supreme Court refused permission to appeal, but even if it had been possible to appeal successfully against the judgment of the Court of Session, with the reference already lodged, it would still have been for the referring court to draw its own conclusions as to the need to proceed with the reference, emphasising the direct relationship between the Court of Justice and the referring court exercising an “autonomous jurisdiction” to utilise the preliminary ruling mechanism: see *Cartesio Oktató és Szolgáltató bt*, Case C-210/06, EU:C:2008:723, at [95].

Having agreed to an expedited procedure, Advocate General Campos Sánchez-Bordano gave his Opinion on 4 December 2018, recommending that the Court find the reference admissible and that unilateral revocation of an Article 50 withdrawal notification possible, provided it is made (1) in writing; (2) in accordance with national constitutional requirements; (3) before the expiry of the time period for withdrawal to take effect – two years unless extended; and (4) in good faith, respecting the principle of sincere cooperation and not involving an abusive practice. On 10 December 2018 – the eve of a scheduled, but ultimately postponed, House of Commons vote on the texts of the Withdrawal Agreement and Political Declaration – a Full Court gave its ruling. The judgment focused, first, on the issue of admissibility and, secondly, on the substance of the right to revoke.

First, in its written observations and at the oral hearing, the UK Government focused solely on its position that the question raised in the reference was hypothetical and an attempt to obtain an “advisory opinion” of the Court beyond the limited availability of that remedy within the structure of the EU treaties. The UK did not intend to revoke its Article 50 TEU withdrawal notification and, should it seek to do so and encounter resistance, that would be the point when the issue of the right to revoke could become live.

However, the Court found the reference admissible, repeating the position it had stated previously that where a national court refers an issue of interpretation of EU law, the Court is, in principle, bound to give a reply. Indeed, it is “solely for the national court” to determine the need for a preliminary ruling and the relevance of the question to be raised, giving rise to a “presumption of relevance”: *Gauweiler*, Case C-62/14, EU:C:2015:400, at [25]. Significantly, the Court would not call into question the referring court’s assessment of the admissibility of the action. Clearly it would be wrong for the Court to review issues of admissibility as they arise under domestic law. Nonetheless, that could not prevent the Court from making its own determination as to the appropriateness of the use of the Article 267 TFEU process. It remained for the Court to determine whether the limited circumstances in which the Court would refuse a reference – where the interpretation of EU
law bears no relation to the facts of the dispute; the problem is hypothetical; or the Court does not have sufficient information – arose. The Court was satisfied that there was a genuine dispute that was not hypothetical, and one which raised a relevant issue of the interpretation of EU law. The reference was admissible.

Secondly, while the UK Government expressed no opinion on the revocation question, the European Commission and the Council contended that a right to revoke an Article 50 TEU notification required the consent of the Union. They argued that otherwise there was a risk that a revocation could be used tactically or abusively by a withdrawing state, particularly with a view to extending the withdrawal negotiation period (which would otherwise require the unanimous agreement of the other EU states). However, the Court determined that – in the absence of any express provision governing revocation – there is a right to unilateral revocation analogous to the unilateral right to withdraw established in Article 50 (1) TEU. The Court made clear that withdrawal from the EU is a “sovereign choice”, at [50], and a “sovereign right” enshrined in Article 50 TEU, at [56]. Therefore, any decision to revoke a notification of an intention to withdraw represents “a sovereign decision by that State to retain its status as a Member State”, a status that “is not suspended or altered” by a withdrawal notification, at [59]. The frequent use of the word “sovereign” when considered in light of the Court’s repetition of its well-known characterisation of the nature of EU law – an independent source of law having both primacy and direct effect, at [45] – and its reference to the values of the Union that “form part of the very foundations of the European Union legal order”, at [62], contains a powerful message. It is that membership of the Union, and the legal discipline that flows from that membership, is a voluntary act of sovereign states which they remain free to relinquish or retain. A state can neither be forced to accede to the EU nor to withdraw against its will, at [65].

Unilateral revocation is not unlimited. Consistent with the Advocate General’s Opinion that notification of revocation must be in writing before withdrawal takes legal effect, the Court equally demanded that a decision to revoke must be in accordance with national constitutional requirements. It was not for the Court to state what those requirements should be, although it at least assumed that it follows a “democratic process”, at [67]. In a departure from the Advocate General’s Opinion, the Court was more specific that the revocation must be “unequivocal and unconditional” such that its purpose is to “confirm the EU membership of the Member State concerned under terms that are unchanged” and that “brings the withdrawal procedure to an end”, at [74]. Revocation is not, therefore, a means of pausing the withdrawal process; it must terminate it.
Unless the negotiation period is extended at the request of the UK and with the consent of EU states, the UK has until 29 March 2019 to decide whether it wants to return its Brexit bullet to the Article 50 chamber.

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THE STATE OF DIVORCE LAW

OWENS v Owens [2018] UKSC 41 is a landmark case that has drawn a great deal of public attention to the current legal framework for divorce in England and Wales, not least on account of the fact that what began as a simple divorce petition here culminated in the Supreme Court’s pronouncement that the parties “must remain married for the time being” (at [44]). The case has raised fundamental questions about the state of divorce law and, in particular, about whether it should be possible for parties to be compelled by the state to remain in an unhappy marriage. As such, it has intensified the broader and ongoing debate about the reform of divorce law in England and Wales; and within a matter of weeks of the Supreme Court giving its judgment, the Government had launched a public consultation on the reform of the legal requirements for divorce.

Mr. and Mrs. Owens were married in 1978. In February 2015, Mrs. Owens moved out of the matrimonial home; and in May 2015, she issued a petition for divorce. Under section 1(1) of the Matrimonial Causes Act 1973 (the MCA), there is only one ground on which a petition for divorce may be presented to the court: “that the marriage has broken down irretrievably”. Section 1(2) of the MCA stipulates that the petitioner must satisfy the court of one or more of five facts for it to hold that the marriage has broken down irretrievably. These include, in particular, the behaviour by the respondent in such a way that the petitioner cannot reasonably be expected to live with the respondent (section 1(2)(b)). This fact is by far the most commonly relied upon in the divorce petitions of opposite-sex couples (Office for National Statistics, Divorces in England and Wales: 2017 (September 2018), Pt. 6), and so it was also in Mrs. Owens’ case. The statement of her case was that Mr. Owens had prioritised his work life over their home life; that he had not treated her with love, attention or affection; that his mood swings caused distressing and hurtful arguments; that he had been unpleasant and disparaging about her in front of others, and that she had felt upset and embarrassed about this; and that for years they had been living separate lives under the same roof and were now living apart (Owens v Owens [2017] EWCA Civ 182, at [4]).

Mr. Owens denied that the marriage had broken down irretrievably, and he proceeded to defend the suit. Defended divorces are incredibly rare: as