



[Pagina iniziale](#) > [Formulario di ricerca](#) > [Elenco dei risultati](#) > **Documenti**



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Provisional text

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

26 November 2018 (*)

(Action for annulment — Institutional law — Withdrawal of the United Kingdom from the EU — Agreement setting out the arrangements for withdrawal — Article 50 TEU — Council Decision authorising the opening of negotiations with the United Kingdom with a view to conclusion of that agreement — UK citizens residing in another EU Member State — Preparatory act — Act not open to challenge — Lack of direct concern — Inadmissibility)

In Case T-458/17,

Harry Shindler, residing in Porto d'Ascoli (Italy), and the other applicants whose names are listed in the annex,⁽¹⁾ represented by J. Fouchet, lawyer,

applicants,

v

Council of the European Union, represented by M. Bauer and R. Meyer, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Council Decision (EU, Euratom) of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for that Member State's withdrawal from the European Union (document XT 21016/17), including the annex to that decision establishing directives for the negotiation of that agreement (document XT 21016/17 ADD 1 REV 2),

THE GENERAL COURT (Ninth Chamber, Extended Composition)

composed of S. Gervasoni (Rapporteur), President, L. Madise, R. da Silva Passos, K. Kowalik-Bańczyk and C. Mac Eochaidh, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 5 July 2018,
gives the following

Judgment

Background to the dispute

1 On 23 June 2016 the citizens of the United Kingdom of Great Britain and Northern Ireland voted in a referendum in favour of the withdrawal of their country from the European Union.

2 On 13 March 2017 the United Kingdom Parliament adopted the European Union (Notification of Withdrawal) Act 2017, authorising the Prime Minister to notify the United Kingdom's intention to withdraw from the European Union in accordance with Article 50(2) TEU.

3 On 29 March 2017 the Prime Minister of the United Kingdom notified the European Council of the intention of that Member State to withdraw from the European Union and from the European Atomic Energy Community (Euratom) ('the notification of intention to withdraw').

4 By a declaration made the same day, the European Council stated that it had received the notification of intention to withdraw.

5 On 29 April 2017 the European Council adopted guidelines setting out the framework for the negotiations provided for by Article 50 TEU and establishing the positions and general principles that the EU would defend throughout the negotiations.

6 On 22 May 2017 the Council of the European Union adopted, on the basis of the provisions of Article 50 TEU, read in conjunction with Article 218(3) TFEU, and on the recommendation of the European Commission of 3 May 2017, the decision authorising the European Commission to open negotiations with the United Kingdom for an agreement setting out the arrangements for its withdrawal from the EU and Euratom ('the agreement setting out the arrangements for withdrawal' or 'the withdrawal agreement'; and 'the contested decision').

7 The contested decision nominates the Commission as Union negotiator (Article 1) and stipulates that the negotiations will be conducted in the light of the guidelines adopted by the European Council and in line with the negotiating directives set out in the annex to that decision (Article 2).

8 The annex to the contested decision (document XT 21016/17 ADD 1 REV 2) contains the negotiating directives for the first phase of the negotiations as regards, inter alia, citizens' rights, a single financial settlement, the situation of goods placed on the market and outcome of procedures based on Union law, other administrative issues relating to the functioning of the Union and the governance of the agreement setting out the arrangements for withdrawal.

Procedure and forms of order sought

9 By application lodged on 21 July 2017, the applicants, Harry Shindler and the other applicants whose names are listed in the annex to this judgment, brought the present action.

10 By separate document lodged at the Court Registry on 16 October 2017, the Council raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court.

11 By document lodged at the Court Registry on 20 October 2017, the Commission sought leave to intervene in the present case in support of the form of order sought by the Council, in accordance with Article 143 of the Rules of Procedure.

12 On 30 November 2017 the applicants lodged their observations on the plea of inadmissibility at the Court Registry.

13 Acting on a proposal from the Ninth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to assign the case to a Chamber sitting in extended composition.

14 Acting on a proposal from the Judge-Rapporteur, the Court (Ninth Chamber, Extended Composition) decided, in accordance with Article 130(6) of the Rules of Procedure, to open the oral phase of the procedure, limited to the admissibility of the action.

15 At the hearing held on 5 July 2018, the parties presented their oral arguments and answered the oral questions asked by the Court.

16 The applicants claim that the Court should:

- annul the contested decision, including the negotiating directives annexed to it;
- order the Council to pay the costs, including legal fees of EUR 5 000.

17 The Council contends that the Court should:

- dismiss the action as being manifestly inadmissible;
- order the applicants to pay the costs.

18 By document lodged at the Court Registry on 5 September 2018, the applicants produced further evidence, pursuant to Article 85 of the Rules of Procedure, on which the Council was given the opportunity to comment.

Law

19 The Council claims that the action based on Article 263 TFEU is manifestly inadmissible since the contested decision is not open to challenge by natural or legal persons and the applicants have no interest or standing to bring proceedings against the contested decision.

20 The applicants dispute the Council's argument and take the view that the action is admissible.

Admissibility of the action

21 The Court considers it appropriate to rule on whether the contested decision is open to challenge and on the standing of the applicants, within the meaning of the fourth paragraph of Article 263 TFEU, and to assess, in that regard, whether the contested decision is of direct concern to the applicants. More precisely, it is appropriate to consider whether the contested decision directly affects the applicants' legal situation.

22 The Council claims that the contested decision cannot be the subject of an action for annulment since it is, as regards the applicants, a measure of a preliminary or preparatory nature,

intended to pave the way for the agreement setting out the arrangements for withdrawal pursuant to Article 50 TEU. Authorising the Commission to open negotiations on behalf of the Union and to conduct those negotiations in the light of the guidelines adopted by the European Council and in line with the negotiating directives annexed to the decision does not affect the applicants' legal situation, which remains the same before and after the adoption of the contested decision.

23 Furthermore, the Council claims that the applicants do not have standing to bring proceedings pursuant to the fourth paragraph of Article 263 TFEU since, inter alia, the contested decision is not of direct concern to them. In particular, the contested decision does not affect the applicants' legal situation. First, it is not the contested decision which triggered the procedure laid down in Article 50 TEU but the notification of intention to withdraw. If the Council had not adopted the contested decision the procedure laid down in Article 50 TEU would have followed its course and, two years after the notification of intention to withdraw, the United Kingdom would have left the Union without an agreement setting out the arrangements for withdrawal. Second, the contested decision also did not 'ratify' the notification of intention to withdraw and merely acts upon that national decision without having any effect on the right of the applicants. Irrespective of the adoption of the contested decision, the United Kingdom continues to be a member of the Union until the date of its withdrawal and the applicants continue to benefit from the rights they derive from the Treaties in that regard. It is only at the end of the procedure laid down in Article 50 TEU that the rights of the applicants are liable to be affected, to an extent which is not, however, possible to predict.

24 The applicants maintain that the contested decision may be the subject of an action for annulment. They also argue that their standing to bring proceedings stems from the fact that they are expatriate UK citizens and citizens of the EU, that they reside in another Member State and that they were denied, because of the so-called '15 years rule', the right to vote in the referendum of 23 June 2016 and in the general elections of 7 May 2015 which led to the appointment of the Members of Parliament who 'confirmed' the referendum by adopting the European Union (Notification of Withdrawal) Act 2017.

25 First, the applicants claim that the contested decision has a direct impact on the rights they derive from the Treaties, inter alia as regards their status as EU citizens and their right to vote in European and municipal elections, their right to respect for their private and family life, their freedom to move, reside and work, their right to own property and their right to social security benefits.

26 Second, the applicants argue that the contested decision is not merely an interim measure before the United Kingdom's withdrawal from the EU, since it comprises, in addition to an express act opening negotiations, an implicit act by which the Council accepted the notification of intention to withdraw. The contested decision acknowledged the irreversible 'exit' of the United Kingdom from the EU on 29 March 2019.

27 Third, the applicants state that the contested decision, particularly its negotiating directives producing legal effects, does not include an objective to ensure that UK citizens who obtained the status of EU citizen before 29 March 2019 maintain that status. Whether an agreement is reached or not, there is no doubt as to the loss in the short or medium term of rights and freedoms conferred on UK citizens by EU law, in particular EU citizenship.

28 Fourth, the applicants claim that the Council should have refused or stayed the opening of negotiations. They argue that the withdrawal procedure is void in the absence of definite constitutional authorisation based on the votes of all UK citizens, who are also EU citizens. They state that the Council and the United Kingdom should have sought judicial review of the

constitutionality of the notification of the intention to withdraw pursuant to the principle of sincere cooperation provided for in Article 4(3) TEU, and that the Council should have requested the opinion of the Court as to the compatibility with the Treaties of depriving expatriate UK citizens of the right to vote and of their indirect representation by MPs, pursuant to Article 218(11) TFEU. They add that to dismiss the present action for inadmissibility would infringe the principle of democracy.

29 Fifth, the applicants claim that the present action is the sole effective form of legal remedy before the EU Courts before the inescapable loss of their status as EU citizens on 29 March 2019 as a consequence of the contested decision.

30 In that regard, it follows from settled case-law that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects that are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position (judgments of 11 November 1981, *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 9, and of 26 January 2010, *Internationaler Hilfsfonds v Commission*, C-362/08 P, EU:C:2010:40, paragraph 51).

31 Furthermore, where, as in the present case, an action for annulment is brought by non-privileged applicants against a measure that has not been addressed to them, the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of the applicant, by bringing about a distinct change in his legal position, overlaps with the conditions laid down in the fourth paragraph of Article 263 TFEU (judgment of 13 October 2011, *Deutsche Post and Germany v Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 38).

32 It is clear from the fourth paragraph of Article 263 TFEU that the standing of a natural or legal person to institute proceedings against an act that is not addressed to him requires, at the very least, that that act, whether or not a regulatory act, is of direct concern to him. The condition that a natural or legal person is directly concerned by the act which is the subject matter of the proceedings requires that the contested measure directly affects the legal situation of the applicant (see, to that effect, judgments of 5 May 1998, *Dreyfus v Commission*, C-386/96 P, EU:C:1998:193, paragraph 43 and the case-law cited, and of 13 October 2011, *Deutsche Post and Germany v Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 66).

33 Thus, both the requirement that the binding legal effects of the contested measure be capable of affecting the interests of the applicant by bringing about a distinct change in his legal position and the condition that a natural or legal person must be directly concerned by the act forming the subject matter of the proceedings, as laid down in the fourth paragraph of Article 263 TFEU, require that the contested decision in this action directly affects the legal situation of the applicants.

34 However, in the present case, the contested decision does not directly produce such effects.

35 The contested decision was taken by the Council on the basis of the third sentence of Article 50(2) TEU, in combination with Article 218(3) TFEU.

36 Article 50(1) to (3) TEU states:

‘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.’

37 Article 218(3) TFEU, to which Article 50(2) TEU refers, is worded as follows:

‘The Commission ... shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team.’

38 The contested decision is, in accordance with Article 288 TFEU, binding in its entirety. The decision authorises the Commission to open negotiations on behalf of the EU for an agreement with the United Kingdom setting out the arrangements for that Member State’s withdrawal from the European Union and from Euratom and nominates the Commission as the Union negotiator (Article 1 of the contested decision). The contested decision stipulates that the negotiations will be conducted in the light of the guidelines adopted by the European Council and in line with the negotiating directives set out in the annex to that decision (Article 2 of the contested decision).

39 The Court has held that a decision adopted on the basis of Article 218(3) and (4) TFEU produced legal effects as regards relations between the European Union and its Member States and between the EU institutions (see, to that effect, judgments of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraph 40, and of 16 July 2015, *Commission v Council*, C-425/13, EU:C:2015:483, paragraph 28).

40 It should be noted that the contested decision has legal effects as regards relations between the European Union and its Member States and between the EU institutions, particularly as regards the Commission. The Commission is, as a result of that decision, authorised to open negotiations for an agreement with the United Kingdom in the light of the guidelines adopted by the European Council and in line with the negotiating directives adopted by the Council.

41 By contrast, the contested decision does not directly affect the legal situation of the applicants.

42 To begin with, the contested decision, by which the Council authorised the Commission to open negotiations with the United Kingdom in accordance with Article 50(2) TEU, must not be confused with the United Kingdom’s decision to withdraw from the EU under Article 50(1) TEU.

43 The contested decision must also be distinguished from the act of 29 March 2017 by which the Prime Minister of the United Kingdom notified the European Council of that country’s intention to withdraw from the EU and Euratom. It is the notification of intention to withdraw and not the contested decision which initiated the withdrawal procedure provided for in Article 50(2) and (3) TEU and set running the two-year time limit, provided for in Article 50(3) TEU, at the end of

which, in the absence of a withdrawal agreement, the Treaties will cease to apply to the State concerned, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

44 Furthermore, the contested decision does not alter the legal situation of UK citizens resident in one of the European Union's other 27 Member States ('the EU 27'), whether that be their situation at the date of the contested decision or their situation from the date of the United Kingdom's withdrawal from the EU. In particular, the applicants are wrong to claim that they are directly affected, inter alia as regards their status as EU citizens and their right to vote in European and municipal elections, their right to respect for their private and family life, their freedom to move, reside and work, their right to own property and their right to social security benefits.

45 The contested decision does not affect the rights of the applicants who, as the Council points out, have the same rights after the contested decision as before. As regards the rights of UK citizens in the EU 27 from the date of withdrawal, the contested decision merely constitutes a preparatory act for any final agreement, which would be subject to a subsequent decision of the Council, acting by qualified majority, after obtaining the consent of the European Parliament (see, by analogy, regarding a Council decision authorising the Commission to open negotiations with a view to concluding an international agreement, judgment of 10 May 2017, *Efler and Others v Commission*, T-754/14, EU:T:2017:323, paragraph 34).

46 Annulment of the contested decision would thus have no impact on the legal situation of UK citizens, including those who, like the applicants, live in another EU Member State and did not have the right to vote in the referendum of 23 June 2016 and the UK general elections. It would lead neither to annulment of the notification of intention to withdraw nor to suspension of the two-year time limit provided for by Article 50(3) TEU. The applicants' rights would remain unchanged.

47 Although it is true that the applicants' legal situation, particularly as regards their status as EU citizens, is likely to be affected when the United Kingdom withdraws from the EU, whether or not an agreement is concluded, such potential effect on their rights — the nature and extent of which cannot, however, be known at this time — does not result from the contested decision, as the Council correctly states.

48 In those circumstances, the contested decision does not directly affect the legal situation of the applicants, and consequently they may not bring an action for annulment and, in addition, do not have standing to bring proceedings under the fourth paragraph of Article 263 TFEU.

49 None of the other arguments put forward by the applicants is sufficient to call that finding into question.

50 In the first place, the applicants argue that the contested decision is not merely an interim measure before the United Kingdom's withdrawal from the EU, since it comprises, in addition to an express act opening negotiations, an implicit act by which the Council accepted the notification of intention to withdraw. According to the applicants, the contested decision acknowledged the irreversible 'exit' of the United Kingdom from the EU on 29 March 2019.

51 That argument cannot be upheld.

52 It is true that the contested decision is not merely an interim act or a preparatory act before the withdrawal of the United Kingdom from the Union, insofar as it applies to relations between the European Union and its Member States and between the EU institutions. For the Member States and

for those institutions, the contested decision produces legal effects as described in paragraph 40 above. However, that is not the case with regard to the applicants, in respect of whom the decision must be considered to be a preparatory act which, as was stated in paragraphs 41 to 48 above, does not have direct legal effects.

53 Furthermore, the applicants are wrong to claim that the contested decision comprises an implicit acceptance of the notification of intention to withdraw and that it acknowledged the ‘exit’ of the United Kingdom from the EU.

54 As was stated in paragraphs 42 and 43 above, the contested decision must not be confused with the United Kingdom’s decision to withdraw from the EU under Article 50(1) TEU, or with the notification of intention to withdraw.

55 In addition, the Council did not, by the contested decision, implicitly accept the notification of intention to withdraw.

56 It is clear from the wording of Article 50 TEU that the possibility for a Member State to withdraw from the Union is based on a unilateral decision by that Member State pursuant to its own constitutional requirements. Article 50(1) TEU thus provides that a Member State may ‘decide’ to withdraw from the EU. Article 50(2) TEU also states that the Member State ‘decides’ to withdraw from the EU and is to notify the European Council of its intention to withdraw from the Union, not to make a request to withdraw.

57 Article 50(3) TEU confirms that the possibility for a Member State to withdraw from the EU is not subject to authorisation from the EU institutions. According to Article 50(3) TEU, without a withdrawal agreement the Treaties would cease to apply to the State in question two years after notification by that State of its intention to withdraw from the Union, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

58 In that regard, although Article 50(1) TEU provides that the decision by which a Member State decides to withdraw from the Union is taken in accordance with its own constitutional requirements, that does not mean that the withdrawal decision gives rise to a decision of acceptance from the EU institutions, by which they confirm that the State in question has respected those requirements. Such a decision of acceptance by the Council or by any other EU institution is not needed and is not provided for by Article 50 TEU.

59 In accordance with Article 50 TEU, the contested decision does not contain any decision ratifying or accepting the notification of intention to withdraw. Moreover, the institution to which the notification of intention to withdraw was addressed was not the Council but the European Council, which, by declaration of 29 March 2017, stated that it had received that notification. Similarly, the Council did not decide, by the contested decision, that the United Kingdom ‘would leave’ the EU on 29 March 2019. Although recital 4 of the contested decision states that the Treaties will cease to apply to the United Kingdom from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council, in agreement with the United Kingdom, unanimously decides to extend this period, that recital, which merely repeats the wording of Article 50(3) TEU, does not mean that the Council decided that the withdrawal of the United Kingdom would take place on 29 March 2019.

60 Therefore, the applicants are not justified in claiming that the contested decision constitutes an implicit act by which the Council accepted the notification of intention to withdraw or that the contested decision acknowledged the ‘exit’ of the United Kingdom from the EU on 29 March 2019.

61 In the second place, the applicants claim that the contested decision, particularly the negotiating directives which are annexed to it and which produce legal effects, does not include an objective to ensure that UK citizens who obtained the status of EU citizen before 29 March 2019 maintain that status. They claim that there is no doubt as to the loss in the short or medium term of rights and freedoms conferred on UK citizens by EU law. If a final agreement is reached by the Council, the current negotiations would merely determine the extent of the loss of expatriate UK citizens' rights deriving from EU law. In the absence of an agreement, the Council would not have provided, in the contested decision and its negotiating directives, for protection of UK citizens' established rights. Therefore, that decision does not protect UK citizens' status as citizens of the EU and provides no certainty as to the rights of UK citizens for the period after the date of withdrawal.

62 However, the contested decision, in particular insofar as it includes directives for the negotiation of the withdrawal agreement, does not constitute an act laying down the rights of UK residents living in the EU 27 in the event that an agreement is reached. The negotiating directives merely stipulate, using, at least in the English and French language versions, the conditional tense rather than mandatory terms, the objectives of the EU in the context of negotiations with the United Kingdom. Paragraph 11 of the negotiating directives mentions in particular that safeguarding the status and rights of the EU 27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU 27 is the first priority of the negotiations. Section III.1 of the negotiating directives, dedicated to citizens' rights, provides that the agreement 'should' safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date as well as rights which are in the process of being obtained (Article 20). Section III.1 also provides that the agreement 'should' cover at least the definition of the persons to be covered and that the personal scope 'should' be the same as that of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) and include persons covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) (Article 21).

63 Accordingly, the negotiating directives cannot produce legal effects as regards UK citizens in an EU 27 Member State. First, they do not necessarily stipulate the final positions of the EU in the context of the negotiations, since, as Article 4 of those directives expressly states, they can be amended or supplemented, where necessary, throughout the course of the negotiations, in particular to reflect the European Council guidelines as they evolve. Second, the negotiations may not necessarily result in the conclusion of an agreement. Third, if the negotiations result in the conclusion of an agreement, the rights of UK citizens in the EU 27 that may be determined by that agreement will not, by definition, be determined unilaterally by the EU but will also depend on the positions of the United Kingdom. Fourth, the provisions on the protection of the status and rights of UK citizens in the EU 27 from the date of withdrawal, as provided for by a possible future agreement, are not the sole competence of the Council, since the decision to conclude the withdrawal agreement is to be taken by the Council, acting by qualified majority, after obtaining the consent of the Parliament. For all these reasons, the negotiating directives are addressed only to the Commission and cannot have the effect of determining the rights of UK citizens living in the EU 27 as from the date of withdrawal.

64 Furthermore, the fact, noted by the applicants, that the negotiating directives do not include an objective to ensure that UK citizens who obtained the status of EU citizen before 29 March 2019 maintain that status, in particular the right to vote in European and municipal elections, does not

directly affect their legal situation. As has been stated, the contested decision, including the negotiating directives, is merely a preparatory act which cannot prejudice the content of any final agreement, particularly as regards the personal scope of any provisions on the protection of the status and rights of UK citizens in the EU 27.

65 In addition, the contested decision, which concerns the negotiations between the EU and the United Kingdom for an agreement setting out the arrangements for withdrawal, is not intended to establish the rights of UK citizens living in the EU 27 as from the date of withdrawal in the event that no agreement is reached. As a result, the applicants cannot validly argue that the Council did not provide, in the contested decision and the negotiating directives, for the protection of the established rights of UK citizens in the absence of agreement and that, as a result, the contested decision provides no certainty as to the rights of expatriate UK citizens as from the date of withdrawal.

66 The applicants' argument concerning the objectives of the contested decision and the negotiating directives must therefore be rejected.

67 In the third place, the applicants claim that the Council should have refused or stayed the opening of negotiations. They assert that the withdrawal procedure is void in the absence of definite constitutional authorisation based on the votes of all UK citizens, who are also EU citizens, and that probably nothing has occurred to require the adoption of the contested decision. The applicants state that they were denied the right to vote in the referendum of 23 June 2016 and for the election of parliamentarians who adopted the European Union (Notification of Withdrawal) Act 2017, because of the '15 years rule' which deprives UK citizens who have been living outside the UK for more than 15 years of the right to vote. In addition, the European Union (Notification of Withdrawal) Act 2017 does not state that the United Kingdom is to withdraw from the EU but merely authorises the Prime Minister to notify the European Union of the United Kingdom's decision to withdraw. The applicants state that legal proceedings are currently underway before a UK court, that the Council and the United Kingdom should have sought judicial review of the constitutionality of the notification of the intention to withdraw pursuant to the principle of sincere cooperation provided for in Article 4(3) TEU, and that the Council also should have requested the opinion of the Court as to the compatibility with the Treaties of depriving expatriate UK citizens of the right to vote and their indirect representation by MPs, pursuant to Article 218(11) TFEU. They add that to dismiss the present action for inadmissibility would infringe the principle of democracy, in so far as removing EU citizenship in March 2019 will occur in circumstances that are illegal, where EU citizens have been deprived of the right to vote.

68 By those arguments the applicants raise substantive pleas which seek, in actual fact, to contest the lawfulness of the contested decision. In fact, they challenge the latter in so far as it did not refuse or stay the opening of negotiations in the light of the conditions under which the referendum of 13 June 2016 and the UK general elections took place and in the light of the content of the European Union (Notification of Withdrawal) Act 2017. They also challenge the contested decision in so far as it was not preceded by court proceedings to verify, in particular, the constitutionality of the notification of intention to withdraw and the compatibility with the Treaties of expatriate UK citizens' lack of a right to vote.

69 However, those substantive pleas have no impact on the admissibility of the action, since they do not call into question the fact that the contested decision does not directly affect the legal situation of the applicants. Even if the Council should have refused to open the negotiations or should have verified that the decision by which the United Kingdom decided to leave the European Union had been taken in accordance with its own constitutional requirements, the fact remains that

the contested decision, which merely authorises the opening of the negotiations with the United Kingdom and sets the directives for conducting those negotiations, does not change the legal situation of the applicants. In particular, if the Council was wrong not to make use of the possibility, provided for in Article 218(11) TFEU, of obtaining the opinion of the Court as to the compatibility of the envisaged agreement with the Treaties, or infringed the principle of sincere cooperation, that fact cannot have the effect of setting aside the conditions governing admissibility expressly provided for in Article 263 TFEU (see, to that effect, concerning the principle of sincere cooperation, judgment of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 40), the request for an opinion being, in any case, for the Council optional and not obligatory.

70 Regarding the allegations of infringement of the principle of democracy, which is set out, *inter alia*, in the preamble to the EU Treaty, in Article 2 TEU and in the preamble to the Charter of Fundamental Rights of the European Union, it cannot validly be argued that the action should be found to be admissible on the basis that the contested decision was made in breach of the principle of democracy. Such reasoning would be tantamount to inferring the admissibility of an action for annulment under Article 263 TFEU from the possible unlawfulness of the contested decision. It follows from the case-law that the seriousness of the alleged infringement by the institution concerned or the extent of its adverse impact on the observance of fundamental rights cannot justify an exception to the absolute bars to proceedings laid down by the FEU Treaty (see, to that effect, order of 10 May 2001, *FNAB and Others v Council*, C-345/00 P, EU:C:2001:270, paragraph 40). That argument is, therefore, ineffective, since the contested decision does not, of itself, restrict the applicants' rights.

71 The applicants' argument that the Council should have refused or stayed the opening of the negotiations, in the light of the lack of definite constitutional authorisation based on the votes of all UK citizens, must therefore be rejected.

72 In the fourth and last place, the applicants claim that the present action is the sole effective form of legal remedy before the EU Courts before the inescapable loss of their status as EU citizens on 29 March 2019 as a consequence of the contested decision. Neither an emergency procedure nor, *a fortiori*, an action for damages could prevent the immediate loss of EU citizenship on that date. The present action should be upheld in accordance with the principle of a Union based on the rule of law and with Article 47 of the Charter of Fundamental Rights.

73 However, it has to be stated that the Council did not, by the contested decision, decide that the United Kingdom would exit the EU on 29 March 2019, as was noted in paragraph 59 above. Any loss of UK citizens' status as EU citizens on 29 March 2019 would therefore not be a result of the contested decision, which as regards the applicants constitutes merely a preparatory act.

74 Furthermore, judicial review of compliance with the European Union legal order is ensured, as can be seen from Article 19(1) TEU, not only by the Court of Justice but also by the courts and tribunals of the Member States (see judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission*, C-456/13 P, EU:C:2015:284, paragraph 45 and the case-law cited). In the present case, as the Council stated, one of the principal complaints invoked by the applicants is that they did not have the right to vote in the referendum of 23 June 2016 or during the election of the parliamentarians who adopted the European Union (Notification of Withdrawal) Act 2017. Those UK citizen voting procedures and, indeed, the notification of intention to withdraw, were open to challenge before the UK courts, which may, where appropriate, refer questions to the Court for a preliminary ruling on the interpretation of the Treaties, pursuant to Article 267 TFEU. In that regard, it must be noted that a number of cases on the legality of the procedures and acts of the UK

authorities implementing the withdrawal procedure provided for by Article 50 TEU have been brought before the UK courts. By a judgment of 28 April 2016, the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) ruled on the application by which Mr H. Shindler and other applicants challenged the legality of the referendum of 23 June 2016, claiming that UK citizens resident in another EU Member State for more than 15 years were deprived of their right to vote by the so-called '15 years rule', in breach of EU law. As was noted at the hearing, the same court, by a judgment of 12 June 2018, also dismissed an application by which Ms E. Webster and other applicants called into question the United Kingdom's conduct of the negotiations for a withdrawal agreement, in the light of the alleged lack of a decision to withdraw taken in accordance with the United Kingdom's constitutional requirements.

75 Last, the applicants claim, in support of their argument that the present action is the only way to ensure their right to effective judicial protection, that after 29 March 2019, in the event of dispute over the possible withdrawal agreement, the United Kingdom would be a third country outside the EU and could consider itself not to be bound by a decision of the EU Courts. After that date, a decision of the EU Courts on any withdrawal agreement would not be enforceable.

76 However, the inadmissibility of the present action is not derived from the possibility for the applicants of bringing a case before the EU Courts against the decision on the conclusion of a possible withdrawal agreement, but follows from the finding that the condition that the contested decision must directly affect the legal situation of the applicants is not satisfied in the present case. Although that condition of admissibility must be interpreted in the light of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights, it cannot be set aside without going beyond the jurisdiction conferred by the FEU Treaty on the EU Courts (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 97 and 98). Moreover, nor is consideration of the admissibility of the present action, which is governed by the rules of the FEU Treaty, dependent on whether the United Kingdom considers itself bound by a decision of the EU Courts in the event of a dispute concerning the possible withdrawal agreement.

77 The argument concerning effective judicial protection must therefore be rejected.

78 It follows from all the foregoing that the contested decision, which does not produce binding legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position, cannot be the subject of an action for annulment. In addition, the applicants, who are not directly concerned by the contested decision, do not have standing to bring proceedings pursuant to the fourth paragraph of Article 263 TFEU. Consequently, the action must be dismissed in its entirety as being unfounded.

Application for leave to intervene

79 In accordance with Article 142(2) of the Rules of Procedure, an intervention is ancillary to the main proceedings and becomes devoid of purpose, inter alia, when the application is declared inadmissible.

80 In those circumstances, there is no longer any need to adjudicate on the Commission's application to intervene in support of the Council.

Costs

81 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

82 As the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Council, in accordance with the form of order sought by the Council.

83 Pursuant to Article 144(10) of the Rules of Procedure, since the proceedings in the main case have concluded before the application to intervene has been decided, the Commission must bear its own costs relating to the application to intervene.

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action as being inadmissible;**
- 2. Declares that there is no longer any need to rule on the European Commission's application for leave to intervene;**
- 3. Orders Mr Harry Shindler and the other applicants, whose names are listed in the annex, to bear their own costs and pay those incurred by the Council of the European Union;**
- 4. Orders the Commission to bear its own costs relating to the application to intervene.**

Gervasoni

Madise

da Silva Passos

Kowalik-Bańczyk

Mac Eochaidh

Delivered in open court in Luxembourg on 26 November 2018.

[Signatures]

* Language of the case: French.

1 The list of the other applicants is annexed only to the version sent to the parties.
