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## UPC and the impact of Brexit – Way forward?

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## Art 50 TEU

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., 5. ...)



**Options**



**Political  
arguments**

**Legal arguments**



## UK Options



**Ratify now**

**Do nothing**

**Withdraw  
now**



## UK Options



**Ratify now:**  
UK = EU MS before  
effect of withdrawal

**Do nothing:**  
Violation of Art 18  
VCLT, suspension  
under Art 60 VCLT

**Withdraw now:**  
UPCA not binding,  
Art 18 VCLT

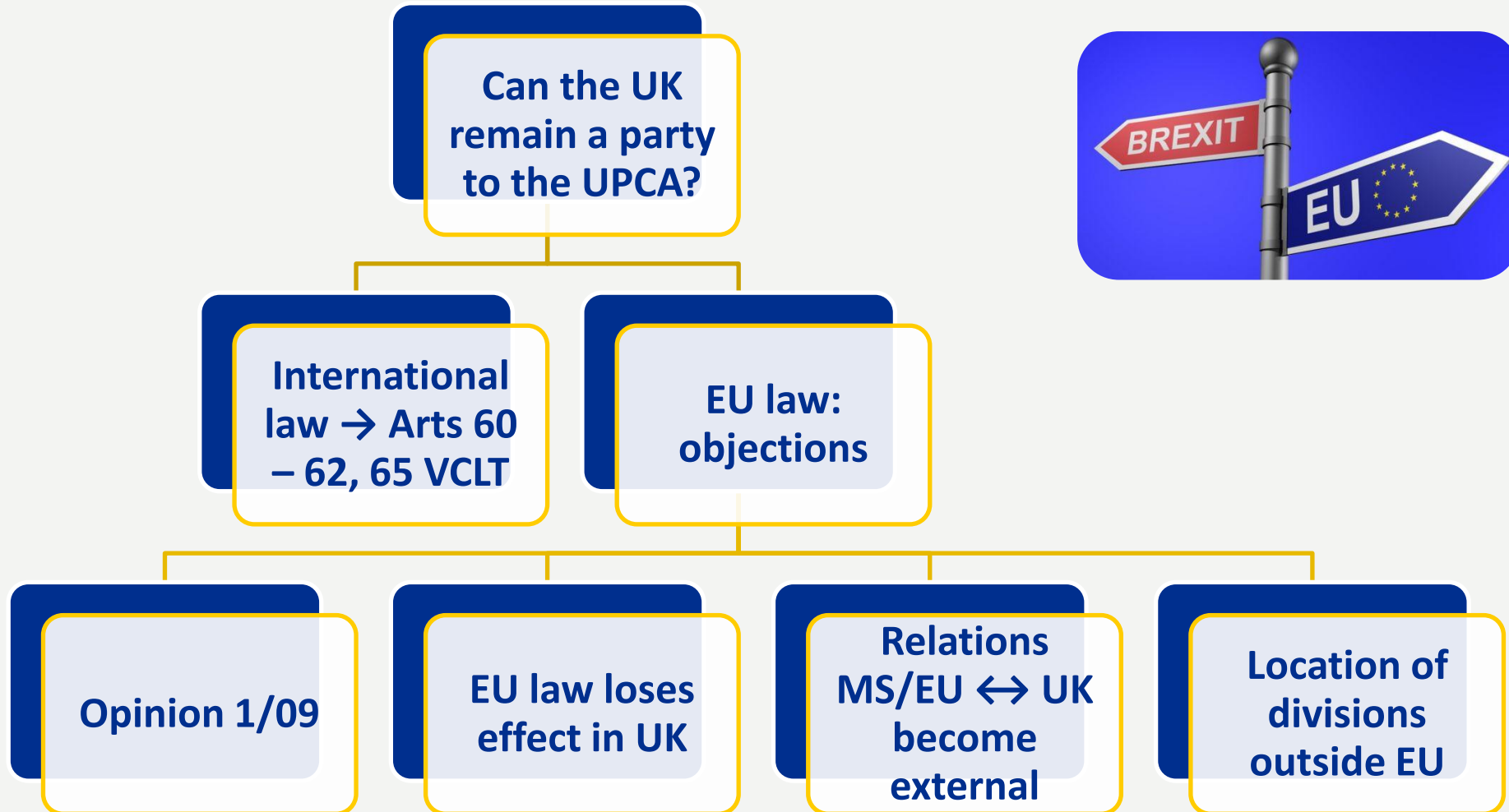


Can the UK remain  
a party to the  
UPCA?



International law →  
Arts 60 – 62, 65  
VCLT

EU law





## Does Opinion 1/09 exclude the participation of non-MS? (1)

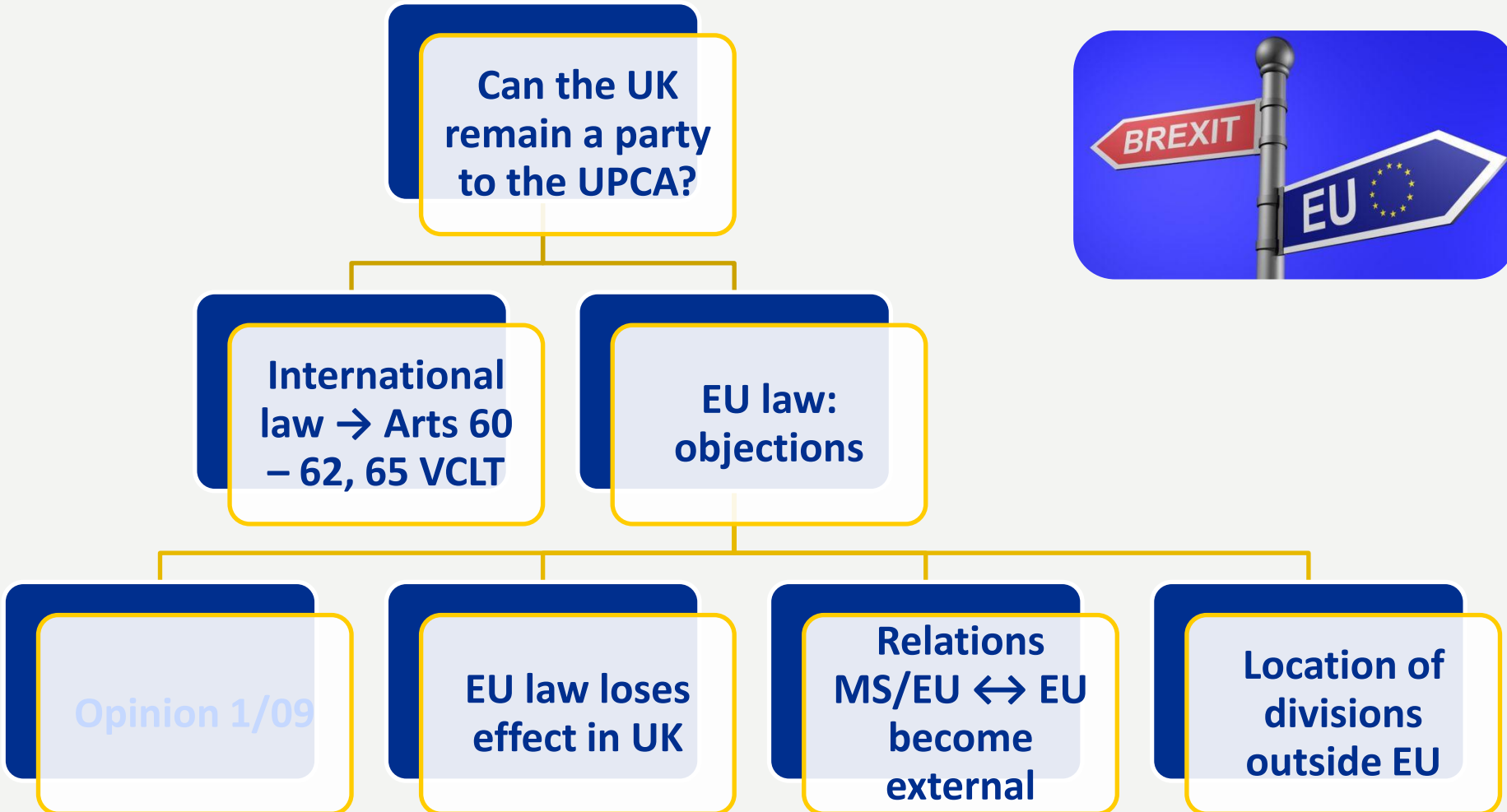
- CJEU's objection to ECPC Agreement: compromises the supremacy and autonomy of EU law
  - application of EU law in its entirety unclear
  - preliminary reference not linked to Art 267 TFEU
  - liability for damages and responsibility for infringement of EU law
- But CJEU prepared to allow the creation of a court by treaty between MS
  - court only in charge of interpreting provisions of agreement
  - court common to MS, such as Benelux Court
  - but other models not excluded (?)
- CJEU never even mentioned the participation of non-MS





## Does Opinion 1/09 exclude the participation of non-MS? (2)

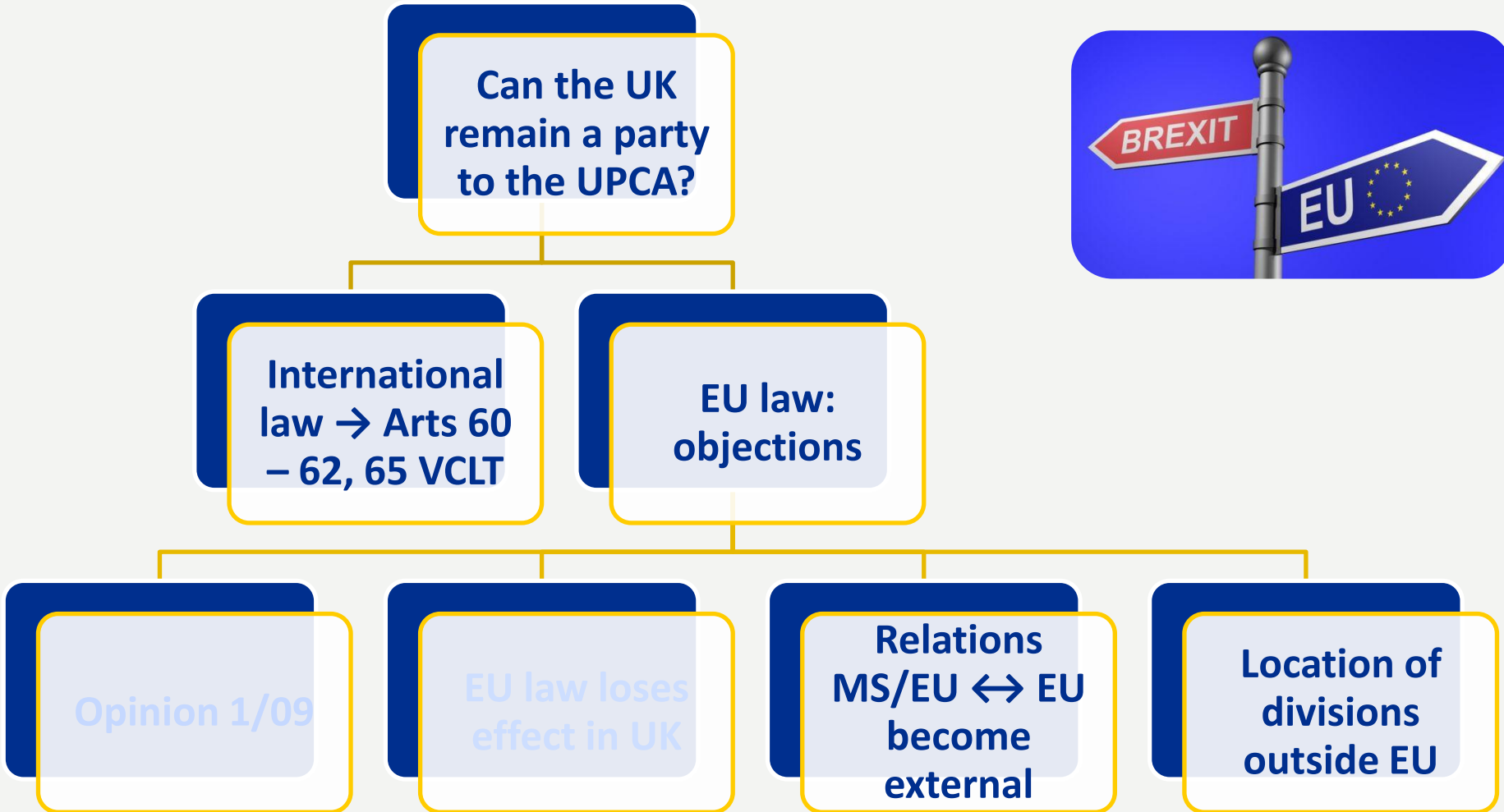
- Supremacy and autonomy of EU law safeguarded by Part 1, Chapter IV UPCA
  - application of EU law in its entirety (Art 20 UPCA)
  - reference subject to same rules as for national courts of MS (Art 21 UPCA)
  - liability for infringements of EU law (Art 22 UPCA)
  - responsibility for infringements of EU law (Art 23 UPCA)
- CJEU seems to have accepted this (case C-146/13 – *Spain v Parliament and Council*)
- These obligations arise from the UPCA (treaty obligations), not from EU law → UK would continue to be bound
- CJEU concerns accommodated





## Is it necessary for UPC contracting states to be bound by EU law?

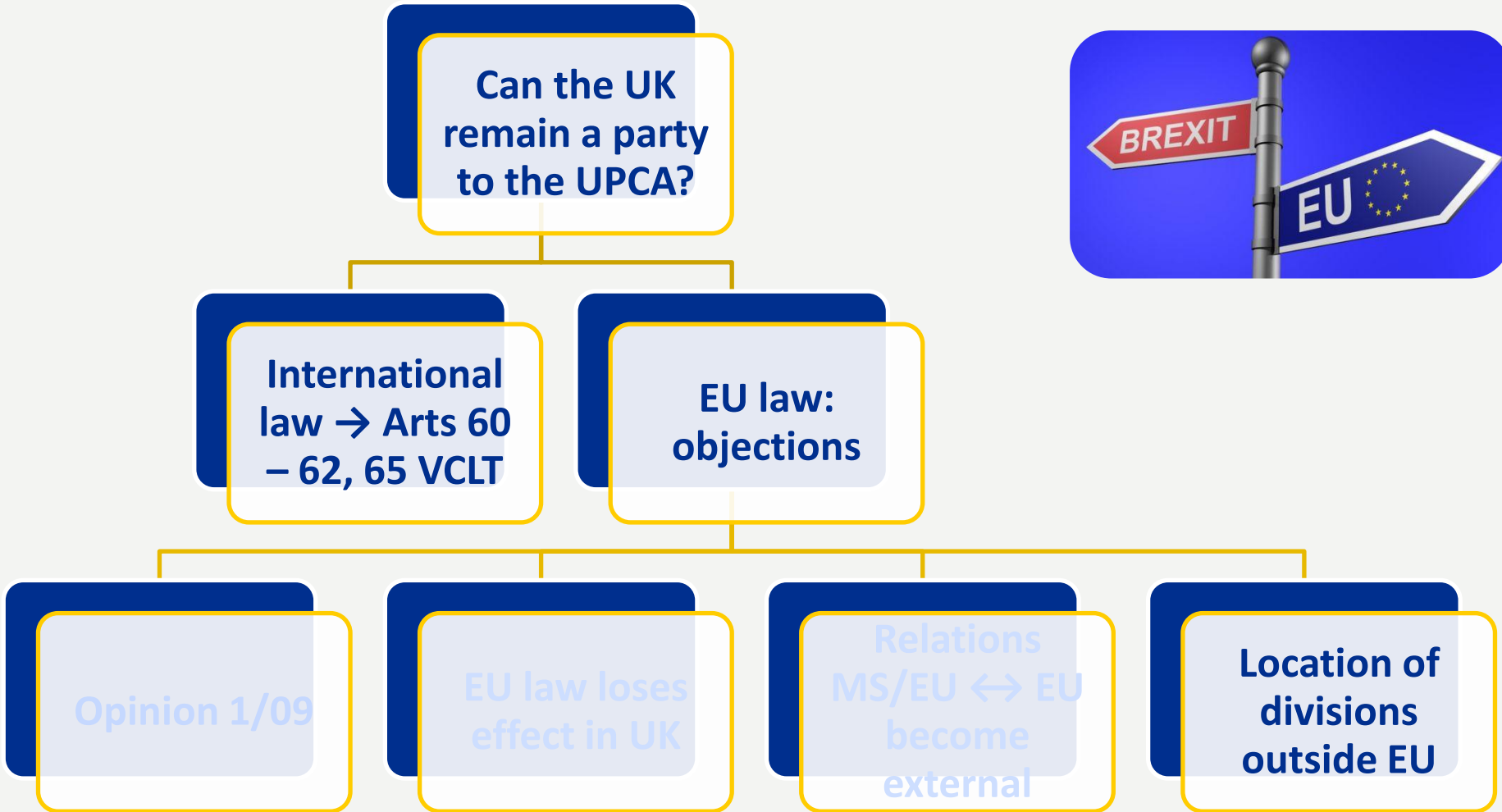
- Part I Chapter IV obligations arise from international law, not from EU law.
- They will not be affected by Art 50 (3) TEU.
- The London Local Division and the London section of the Central division are not UK courts and hence unaffected by Art 267 TFEU losing effect.
- They are integral parts of the UPCA.
- While the UK, by its ratification, would transfer jurisdiction to an international court, it would not have to accept the supremacy of EU law for UK courts.





## How will the metamorphosis of EU/MS – UK relations affect the UPCA?

- Relation between MS are internal relations, all issues of competence relate to EU – MS relation
- But after effect according to Art 50 (3) TEU the relations to the UK will become external
- Exclusive EU competence for common commercial policy (Art 207 TFEU)?
  - Case C-414/11, *Daiichi Sankyo and Sanofi-Aventis v DEMO*: specific link
  - But shared competence whenever MS competences remain affected (see CETA/TTIP)
- Shared competence which becomes exclusive EU competence once the Union has exercised its powers (Art 2 (2) TFEU)
  - Unitary Patent Regulation
  - Enforcement Directive





## The way forward: how could the continuing participation of the UK be arranged?

- UK ratification, accompanied by declaration clarifying intention to remain bound after Brexit
- No additional agreement accepting supremacy of EU law / role of CJEU necessary
- Will the EU have to become a party of the UPCA?
  - shared competence, not fully exercised (unlike UP Regulation)
  - But EU can empower the member states
  - And may even already have done so by passing the UPR
- Agreement under Art 50 (2) TEU can
  - recommend continuing participation
  - extend effect of UP Regulation
  - and empower the MS to take necessary steps



## Would the UPCA have to be amended?

- Link between contracting states and EU member states would have to be severed
- Liability for damage caused by infringement of EU law (Art 22 UPCA)
  - Option 1: no UK liability
  - Option 2: jurisdiction limited to contracting EU member states
- Responsibility for infringement of EU law (Art 23 UPCA)
  - Primary responsibility limited to contracting EU member states
  - UPC responsible for taking necessary steps to comply with reasoned Commission opinion or CJEU judgment
  - Financial liability: see above
- Exhaustion (Art 29) must refer to market in EU and UK
- Amendment of Art 84 UPCA not strictly necessary





## How can this be done?

- Option 1: amendment of UPCA + ratification
- Option 2: amendment by Administrative Committee under Art 87 (2) UPCA
  - Recommendation to continue with UK = Union law
  - Administrative Committee can bring UPCA in line with EU law
  - Rights of MS safeguarded by Art 87 (3) UPCA
- The UPR could be extended by
  - bilateral agreement UK – EU
  - or, after empowerment by the EU, by an international agreement (Art 142 EPC) between the MS and the EU



**Where there is a will, there is also a way.**



**Grazie per la vostra  
attenzione!**

