

## **Alert | International Trade/Brexit**



**December 2018**

### **Brexit – Can the UK Stop Brexit Without EU Consent?**

Advice given to the EU Court of Justice on Tuesday, 4 December recommends that the Court’s judges rule that the U.K. can withdraw its March 2017 notice of intention to leave the EU without the consent of the other 27 EU member states. The advice also recommends that this unilateral right to withdraw the notice should be subject to certain conditions.

The advice is the latest, but not the final, step in a landmark case brought by campaigners before the Scottish Court of Session. Since the case concerns the interpretation of EU law – Article 50 of the EU Treaty, which sets out how a member state may leave the EU – the Scottish Court asked the EU Court for a preliminary ruling. This ruling will be made by the EU Court at a future date that has not yet been publicised, although the Court has expedited its process.

An important part of the procedure leading up to an EU Court ruling is the appointment of one of the Court’s eleven advocates-general to prepare detailed advice to assist the Court in coming to a decision. The advocate general’s opinion, although non-binding, is usually, although not always, followed by the Court.

In his opinion on 4 December, Advocate General Manuel Campos Sánchez-Bordona first addresses the U.K. government’s claim that the case is inadmissible because it is hypothetical and theoretical, since there is no indication of the government’s or parliament’s intention to revoke the Brexit notice. He considers that this claim should be rejected on the basis that the question has “obvious practical importance” and is “essential in order to resolve the dispute”.

The advocate general then rejects the view submitted by the EU, that withdrawal of the U.K.'s notice should be subject to the permission of the other 27 EU member states. He considers the interpretation of the wording of Article 50 and, to the extent that it does not make express provision on any point, the basis for Article 50 – the Vienna Convention on the Law of Treaties, Article 68 – which provides that notification of withdrawal from an international treaty may be revoked by a state at any time before the notification takes effect. He notes that withdrawal from an international treaty is as much a unilateral act of a sovereign state as a decision to enter into an international treaty. He reasons that the notification concerns an intention, not a decision, to leave the EU, and intentions can change. Requiring the consent of the other EU member states as to revocation of the notification after a change of intention could result in the revocation being rejected based on the opposition of just one EU member state, with the illogical result that the state withdrawing the notification, whilst still a member of the EU, would be forced to leave the EU against its will, and then apply and negotiate to re-join. The right of a member state to remain a member of the EU as well as to leave would then be outside its control, its sovereignty, and its constitutional requirements. According to Advocate General Campos Sánchez-Bordona, there should therefore be a right of unilateral revocation, although this does not rule out revocation with the consent of the other member states.

However, the advocate general considers that this unilateral right should be subject to conditions and limits. These are that the European Council must be formally notified of the withdrawal of the notice; the right must respect national constitutional requirements; and revocation must occur within two years of the date of the notice. In addition, the Article 50 procedure must not have been abused (for example, by any member state seeking to improve its membership terms). Therefore, for the U.K. to revoke its notification effectively, it would have to be authorised by an act of parliament, just as the March 2017 Brexit notice was authorised, and communicated formally to the EU before 29 March 2019.

It is not clear whether the EU court will issue its ruling before the evening of 11 December 2018, when parliament is due to vote on the Brexit deal negotiated with the EU and approved by the EU Council of Ministers on 25 November 2018. If, despite indications that it has insufficient support in parliament, this deal is accepted, the possibility of unilateral revocation may be academic. If the deal is rejected, however, it will be important. The government will have 21 days after rejection of the deal within which to put forward to parliament its proposed next steps, and within a further seven days parliament will vote on these steps. Even if the Court has not issued its ruling by the time these deadlines start to run, the advocate general's opinion may be viewed as strengthening the argument that revocation of the notice should be included in the government's considerations. It would also help to clarify the position if rejection of the deal resulted in a change of government or leadership, or a second referendum.

For more on Brexit, click [here](#).

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