

Brexit is Not a Done Deal: UK Can Unilaterally Revoke Article 50

December 5, 2018

Key Points

- On December 4, 2018, CJEU AG Campos Sánchez-Bordona opined that the U.K. could unilaterally revoke its Article 50 withdrawal notification, provided that the revocation has been decided upon in accordance with the Member State's constitutional requirements, is formally notified to the European Council and does not involve an abusive practice.
- The CJEU is now expected to confirm this view in a formal judgment before the U.K. House of Commons is scheduled to vote on the Withdrawal Agreement next Tuesday (December 11). This would raise the prospect of the U.K. Parliament voting to revoke its intention to leave the European Union and “remain,” rather than be faced with a stark choice between Prime Minister May's deal and there being no deal by March 29.
- Senior ministers say that it would be the government's decision to revoke Article 50, and not Parliament's. However, if a clear majority of MPs were to support such a parliamentary motion, then the government would presumably have to reconsider. Another Referendum would probably need to occur first, which, in turn, would necessitate the EU27 agreeing to extend the two-year period beyond March 29 for at least a couple of months. While Prime Minister May is expected to lose the vote next Tuesday, many currently think that she should prevail on a second vote around January 21.

Background

On March 29, 2017, the U.K. government formally notified the European Council of its intention to leave the EU, starting the clock on a two-year negotiation period on the terms of the U.K.'s withdrawal (the “Article 50 Notification”).

Convinced that Brexit was not a done deal, in late 2017, a cross-party group of seven Scottish politicians¹ (the “Pursuers”) commenced an action in the Scottish Court of Session to prove that the U.K. could unilaterally revoke its Article 50 withdrawal notice.

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Whereas the Outer House of the Court of Session initially declined to consider this question on the basis that the U.K. government did not have any intention to revoke the Article 50 Notification and so the question should be considered purely hypothetical and academic in nature, on appeal, the Inner House of the Court of Session disagreed with the Outer House and ultimately referred the following questions to the Court of Justice of the European Union (CJEU):

“Where, in accordance with Article 50 of the TEU, 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 EU.” (the “Questions”).

The case (Wightman and Others; C-621/18) was heard by the CJEU under the expedited procedure on November 27, 2018.

Constitutional Significance

In anticipation of leaving the EU, Section 13 of the European Union (Withdrawal) Act 2018 provides that the U.K. Parliament will be faced with a binary choice—to approve or not to approve—the terms of the withdrawal agreement that was provisionally agreed between the U.K. government and the European Union. This would give rise to a stark choice between leaving with a deal that is far from optimal or crashing out of the European Union on World Trade Organization terms. The Pursuers contended that there was another option should the U.K. Parliament consider the deal and no deal scenarios to be unwarranted: revocation of the Article 50 Notification and remaining in the European Union.

Whether this third option is, in fact, on the table depends on whether the CJEU will follow the Advocate General’s (AG) Opinion (which happens in more than 90 percent of cases). Whereas the U.K. government contends that the Questions are hypothetical and should therefore not be admissible, and the EU institutions believe that any revocation of the Article 50 Notification would necessitate the unanimous consent of all 27 EU Member States, the Pursuers argued that not allowing the U.K. to unilaterally revoke its Article 50 Notification would fail to respect both the sovereignty of the U.K. and democracy.

The Opinion of the Advocate General

On December 4, AG Campos Sánchez-Bordona opined that, crucially, Article 50 of the Treaty on European Union (TEU) does allow for unilateral revocation of the Article 50 Notification, provided that such revocation (1) is in line with the relevant national constitutional requirements (i.e., the U.K. Parliament must authorize the revocation), (2) is formally notified to the European Council, (3) is effected before the expiry of the two-year period that begins when the intention to withdraw is notified (presumably subject to any extensions of this period) and (4) is done in accordance with the principles of good faith and sincere cooperation.

The AG’s conclusion is predominantly based on his consideration that withdrawal from an international treaty is, by definition, a unilateral act of a state party and is a manifestation of its sovereignty; so long as the U.K. has not formally left the European

Union (which would happen on March 29, 2019, as it now stands), the U.K. should be free to change its “intention” to withdraw.

Significance of the Case

The AG opinion is merely advisory in nature, and the CJEU has yet to issue its judgment. It is expected that the CJEU will publish its decision before the U.K. will vote on the withdrawal agreement on December 11, 2018. However, whether or not the CJEU will have its decision ready in time, past experience shows that the CJEU usually follows the conclusions of the AG and, hence, the U.K. Members of Parliament may approach the December 11 vote on the assumption that there are three, rather than two, options on the table, increasing the likelihood that Brexit might not happen after all.

¹ Andrew Wightman and Others [[2018] CSOH 61]. The group is headed by Andy Wightman MSP, and the other pursuers are Ross Greer MSP, Alyn Smith MEP, David Martin MEP, Catherine Stihler MEP and Joanna Cherry QC MP. English MPs Tom Brake and Chris Leslie were joined in the case in May 2018.