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Preliminary opinion of EU Court of Justice suggests that United Kingdom could still avoid Brexit

On 4 December, EU Court of Justice Advocate General Campos Sánchez-Bordona concluded that the United Kingdom may unilaterally withdraw its intention to leave the European Union before 29 March 2019 and therefore remain in the EU. This is so long as the revocation notice is made before the formal conclusion of a withdrawal agreement and it respects the UK's constitutional requirements.

Definitive ruling expected very soon which could have important consequences

The EU Court of Justice must now render its judgment in the case but generally the Court follows the opinions of the Advocate General. If confirmed by the Court (possibly as early as next week), this interpretation of Article 50 Treaty on the European Union, the provision stipulating the procedure to withdraw from the EU, would give the UK the opportunity to revoke its intention to leave the EU on 29 March 2019, without requiring the permission of the other 27 EU Member States in order to do so. Given the current uncertainty in the UK around whether or not its parliament will ratify the draft withdrawal agreement, a judgment by the Court of Justice to this effect could have real political consequences for Brexit.

The pending case arose from a question asked by a Scottish court, which wanted the Court of Justice to provide judgment upon whether or not a Member State which has notified the European Council of its intention to withdraw from the EU under Article 50 TEU may unilaterally revoke its notification and, if so, under what conditions. Given that Article 50 TEU is silent on this point and has never been used before, this raises novel questions in EU law requiring clarification from the Court of Justice.

Numerous legal arguments in favour of possibility of unilateral withdrawal

According to the opinion of Advocate General Campos Sánchez-Bordona and contrary to the assertions of the European Commission and the Council of the EU in the case, Article 50 TEU does indeed permit the unilateral revocation of the notification of the intention to withdraw from the EU until such time as the withdrawal agreement has been concluded, subject nonetheless to certain conditions being respected.

The AG's reasoning stems from Article 68 of the Vienna Convention on the Law of Treaties, upon which Article 50 TEU is based, which states in no uncertain terms that notifications of withdrawal from an international treaty may be revoked at any time before the actual withdrawal. Unilateral revocation of such withdrawal must be regarded as a sovereign act of the departing Member State. The AG also pointed to several reasons which support the unilaterally revocable character of the notification. Amongst those reasons was the fact that, under Article 50(2) TEU, the departing State must only

notify the Council of its 'intention' to withdraw, and not of its decision to do so, and an intention can change. He highlighted also that, in other areas of law, a party which has unilaterally issued a declaration of intent may retract until the addressee's acceptance has been formally conveyed as well as the existence of two distinct phases in Article 50, namely a declaration of intention followed by a phase leading to departure, which implies that the declaration of intention is not definitive. In addition, rejecting the possibility of revocation would amount to forcing the exit of a Member State which, according to the Court of Justice's case law, remains an EU Member State in all respects.

Certain procedural conditions to respect if UK withdraws its intention to leave the EU

Nevertheless, AG Campos Sánchez-Bordona considers that the unilateral revocation must be subject to certain conditions and limits. In light of the wording of Article 50 TEU, it must be formally notified to the European Council and adopted in accordance with that Member State's constitutional requirements. Given the UK Government needed the prior approval of the UK Parliament before its declaration of intention to withdraw from the EU, this would imply that parliamentary authorisation would also be required for the revocation of that declaration. Moreover, revocation may only be allowed within the two-year period which follows the notification of the intention to withdraw and in accordance with the principles of good faith and sincere cooperation such that the right to withdraw the declaration of intention is not abused.

Brexit can still be avoided

In conclusion, if the Court of Justice follows the opinion of AG Campos Sánchez-Bordona, then the UK will still be able to unilaterally revoke its intention to leave the EU before the conclusion of a withdrawal agreement. Any revocation, however, must also occur in theory before 29 March 2019, the date at which the UK ceases to be a member of the EU according to Article 50 TEU and an act of the UK Parliament (the European Union (Withdrawal) Act 2019). This is unless the European Council extends the period, requiring the unanimous agreement of all Member States.

Should you have any questions regarding Brexit and its consequences for your activities, feel free to contact us.

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