

## BREXIT UPDATE

### EUROPEAN COURT OF JUSTICE CONFIRMS ARTICLE 50 CAN BE UNILATERALLY REVOKED

The Court of Justice has confirmed the opinion<sup>1</sup> of Advocate General Manuel Campos Sánchez-Bordona and ruled<sup>2</sup> that the United Kingdom can unilaterally revoke Article 50, without requiring the approval of the other Member States. The UK's EU membership would then continue under the same terms and conditions as before.

Article 50 is silent on the matter of whether a notification can be revoked, but the Court ruled that because the decision to invoke Article 50 is purely sovereign, the decision to revoke should also be decided unilaterally.

In what is being seen as a highly political move, the Court applied the expedited procedure and worked to unprecedented timelines to deliver a ruling ahead of the House of Commons vote on the Withdrawal Agreement. The Advocate General recognised the impact the ruling would have because it would effectively open up the option of the UK "remaining in the European Union in the face of an unsatisfactory Brexit."

#### BACKGROUND

When the UK notified the European Council of its intention to withdraw from the European Union (EU) on 29 March 2017 this was the first time in the EU's history that Article 50 of the Treaty on the European Union (TEU) had been used. Article 50 states that the EU Treaties will no longer apply to a departing Member State (a) from the date of entry into force of the Withdrawal Agreement, (b) failing that, two years after the Article 50 notification, or (c) at some other date if the European Council and the UK unanimously agree to extend the two year period. Article 50 TEU is silent on the matter of whether the notice can be revoked and on the terms that would apply in the case of a

#### Key issues

- The EU Court of Justice has ruled that the UK may unilaterally revoke its notification of withdrawal from the EU under Article 50 of the Treaty.
- That revocation can take place any time before the Withdrawal Agreement enters into force.
- The UK would remain an EU Member State under the same terms and conditions.
- The arguments of the European Commission and the Council of the EU, namely that revocation should require the unanimous agreement of the 27 remaining Member States, were dismissed.

Question referred to the Court of Justice for a preliminary ruling: *'Where, in accordance with Article 50 [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 European Union?'*

<sup>1</sup> See [Opinion](#) of Advocate General Campos Sánchez-Bordona in case C-621/18, 4 December 2018

<sup>2</sup> See [Judgement](#) of the Court in case C-621/18, 10 December 2018

revocation, i.e. whether the UK would remain a Member State on its existing terms (opt-ins, opt-outs, budget rebate, etc).

In December 2017 a group of politicians, from across the political spectrum representing the Scottish, UK and European parliaments brought a case before the Scottish Court of Session seeking an answer to the question: "Can a Member State of the European Union unilaterally revoke their Article 50 TEU notification to leave the EU?"

The Court of Session referred the question to the Court of Justice of the European Union (CJEU) seeking a preliminary ruling under Article 267 of the Treaty on the Functioning of the EU (TFEU). The Scottish Court requested that the question be considered using the expedited procedure<sup>3</sup> because of the urgency of the issue and the need for the petitioners to have an answer to their question ahead of the House of Commons vote on the Withdrawal Agreement scheduled for 11 December 2018. The Court accepted the request for the use of the expedited procedure, recognising the necessity of clarifying "the scope of Article 50 TEU before the Members of the national Parliament make a decision on the withdrawal agreement."<sup>4</sup> In an unprecedented move that is seen as highly political, the European Court issued its ruling barely two months after receiving the Scottish Court's request and one day before the scheduled vote in the House of Commons.

The UK Government, represented by the Secretary of State for Exiting the EU, sought to appeal the decision to refer the case to the CJEU, first in the Scottish Court of Session and then before the UK Supreme Court. The Government argued that the question was purely hypothetical and academic in view of the fact that it had no intention of revoking its Article 50 notification. Both appeal attempts failed.

The applicants, the UK government, the European Commission and the Council of the EU all submitted written observations and appeared at the hearing held at the Court on 27 November 2018.

## JUDGEMENT OF THE EUROPEAN COURT

### "Ever closer union"

The case was heard by the full court, made up of all 25 judges, including President Koen Lenaerts, and the judge rapporteur was the Swede Carl Gustav Fernlund. Judge Fernlund confirmed the opinion of Advocate General Manuel Sánchez-Bordona issued just six days earlier; the UK is free to revoke Article 50 unilaterally.

As is frequently the case, the full court mainly based its arguments on the constitutional values of the EU Treaties, including the principle of "ever closer union". Whereas the Advocate General had relied heavily on the 1969 Vienna Convention on the Law of Treaties (VCLT), for Judge Fernlund this was only a secondary, additional argument. He said the matter had to be examined primarily in the light of the Treaties taken as a whole and interpreted not only on the basis of the wording and objectives set out in Article 50 TEU, but also within the context and according to the provisions of EU law.

Referring to the principles of the "creation of an ever closer union among the people of Europe", the EU's aims of eliminating "barriers which divide Europe" and the importance of the values of liberty and democracy, the Court ruled

### Parties to the case

- Andy Wightman MSP (Scottish Greens, Lothian)
  - Ross Greer MSP (Scottish Greens, West Scotland)
  - Alyn Smith MEP (SNP, Scotland)
  - David Martin MEP (Labour, Scotland)
  - Catherine Stihler MEP (Labour, Scotland)
  - Joanna Cherry QC MP (SNP, Edinburgh South West)
  - Jolyon Maugham QC (Good Law Project)
  - Tom Brake MP (Liberal Democrat, Carshalton and Wallington - joined May 2018 as intervener))
  - Chris Leslie MP (Labour, Nottingham East - joined May 2018 as intervener)
- vs
- UK Secretary of State for Exiting the EU

### With observations submitted by

- European Commission
- Council of the EU

<sup>3</sup> This procedure is provided for in Article 105 of the Rules of Procedure of the Court.

<sup>4</sup> See [Order](#) of the President of the Court in case C-621/18, 19 October 2018

that no State could be forced to accede to the EU against its will, and neither could it be forced to withdraw against its will. The Court argued that it would be inconsistent with the Treaties' purpose of creating an ever closer union among the people of Europe to force the withdrawal of a Member State which, having notified its intention to withdraw from the EU in accordance with its constitutional requirements and following a democratic process, decides to revoke the notification of that intention through a democratic process.

According to the Court, this conclusion is also clear from the origins of Article 50 which was first discussed in the context of the draft Treaty establishing a Constitution for Europe. During that debate and drafting process, amendments aiming to allow the expulsion of a Member State were all rejected on the grounds that the voluntary and unilateral nature of the withdrawal decision should be ensured.

### Article 50 TEU

The Court explained that Article 50 pursues two objectives: (1) enshrining the sovereign right of a Member State to withdraw from the EU and (2) establishing a procedure for that withdrawal to be orderly.

The Court recognised that while Article 50 TEU does not explicitly address the subject of revocation, "it neither prohibits nor expressly authorises revocation." The Judge confirmed the position of the Advocate General (paragraphs 99 to 102 of the opinion) that Article 50(2) TEU merely talks about a Member State notifying its *intention* to withdraw, which is "by its nature neither definitive nor irrevocable."

The ruling referred to Article 50(1) TEU which provides that any Member State may decide to withdraw from the EU in accordance with its own constitutional requirements, noting that there is no requirement to take that decision in concert with the other Member States or EU institutions.

Referring to paragraphs 94 and 95 of the Advocate General's Opinion, the Court agreed that because the right of withdrawal is a sovereign decision, the right of revocation is also sovereign in nature, so long as a withdrawal agreement concluded between the EU and the departing Member State has not yet entered into force (or if no such agreement exists, so long as the two-year period laid down in Article 50(3) TEU has not expired). The Court therefore ruled that a revocation of a withdrawal notification is subject to the rules of Article 50(1) TEU and may be decided unilaterally, in accordance with the constitutional requirements of the Member State concerned.

The Court set out the process of revoking a withdrawal notification as follows: (1) the decision to withdraw an Article 50 notification is taken according to a Member State's own constitutional requirements, (2) the decision is submitted in writing to the European Council, and must be unequivocal and unconditional. This latter point ensures that the terms and conditions of the country's EU membership remain unchanged. The notice brings the withdrawal procedure to an end.

### Vienna Convention

The Court's ruling makes only a passing reference to the Vienna Convention, which had been a key foundation of the Advocate General's opinion. The Court argues that the VCLT corroborates its conclusions because it states that in the event that a Treaty authorises withdrawal, Article 68 of that Convention

### Article 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) [TFEU]. 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. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.  
A qualified majority shall be defined in accordance with Article 238(3)(b) [TFEU].
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

specifies in clear and unconditional terms that a notification of withdrawal "may be revoked at any time before it takes effect."

### Arguments of the parties

The petitioners in the case argued that there is a right of revocation and that it is unilateral in nature. They use the analogy of the right of withdrawal which is set out in paragraph Article 50(1) TEU and which is itself a unilateral decision taken in accordance with the constitutional requirements of the Member State concerned.

The European Commission and the Council of the EU agreed that a Member State is entitled to revoke the notification of its intention to withdraw before the Treaties have ceased to apply to that Member State, but disputed the unilateral nature of that right. The Commission and Council were concerned that a unilateral right of revocation could be abused by a departing Member State that could use this as leverage in the negotiations and / or revoke its notification of withdrawal and then immediately notify once more, thus extending the period for negotiation by an additional two years. In order to guard against such risks, the Council and the Commission proposed that Article 50 TEU should be interpreted as allowing revocation but, by analogy with Article 50(3) TEU on the extension of the two-year period, only with the unanimous consent of the European Council, currently made up of the Heads of State and Government of the remaining 27 EU Member States.

The Court dismissed this argument saying that it would transform a unilateral sovereign right into a conditional right subject to an approval procedure. This in turn would be incompatible with the notion that a Member State cannot be forced to leave the European Union against its will.

It is worth noting that in his opinion the Advocate General dismissed the Commission and Council's arguments about the risk of abuse: "the possibility that a right may be abused or misused is, generally speaking, not a reason to deny the existence of that right. Rather, the abuse must be prevented through the use of the appropriate legal instruments." He concluded that "the principles of good faith and sincere cooperation" must also be observed, in order to prevent abuse of the procedure laid down in Article 50 TEU. Judge Fernlund is silent on this point.

### UK RATIFICATION OF THE WITHDRAWAL AGREEMENT

The UK's EU (Withdrawal) Act 2018 states that the Withdrawal Agreement can only be ratified once an Act of Parliament has been passed which contains provision for the implementation of the Withdrawal Agreement. If the House of Commons rejects the Withdrawal Agreement, the Treaties will cease to apply in the United Kingdom on 29 March 2019. This scenario is what is often referred to as "No deal".

The Scottish Court argued that the Court's ruling would have the effect of clarifying "the precise options open to members of the United Kingdom Parliament when casting their votes." Rather than the UK Parliament facing a choice of either voting for the Withdrawal Agreement or leaving the EU with no deal, a third option would present itself, namely Parliament calling on the UK government to revoke the Article 50 notification, so that the UK could remain a party to the treaties establishing the EU and an EU member state.

#### History and timing of the case

**19 Dec 2017:** Petitioners commence an action in Scottish Court of Session, seeking to know: "Can a Member State of the EU unilaterally revoke an Article 50 TEU notification to leave the EU?"

**May 2018:** Chris Leslie MP and Tom Brake MP join case

**8 June 2018:** Lord Ordinary declines to pursue case because (i) it raises a hypothetical question given lack of evidence that either UK government or Parliament intend to revoke notification and (ii) it encroaches on sovereignty of UK Parliament (appealed by petitioners)

**21 Sep 2018:** Inner House allows appeal against decision of Lord Ordinary and grants request to seek a preliminary ruling from CJEU under Article 267 TFEU, requesting expedited procedure

**3 Oct 2018:** Request for preliminary ruling received by CJEU

**19 Oct 2018:** Order of CJEU to expedite case because "it is necessary to clarify the scope of Article 50 TEU before the Members of the national [UK] Parliament make a decision on the withdrawal agreement"

**8 Nov 2018:** Scottish Court of Session refuses UK Government's leave to appeal referral to CJEU

**20 Nov 2018:** UK Supreme Court refuses Government's request to challenge referral by Scottish Court of Session

**27 Nov 2018:** Hearing, CJEU

**4 Dec 2018:** Opinion of Advocate General Manuel Campos Sánchez-Bordona

**10 Dec 2018:** Judgement by Judge-Rapporteur Carl Gustav Fernlund

**11 Dec 2018:** UK Parliament scheduled vote on Withdrawal Agreement and Political Declaration

**13-14 Dec 2018:** European Council

**29 March 2019** UK due to leave EU

## **POLITICS AND THE COURT**

The timing of the ruling has been seen by many, particularly in the UK, as a highly politicised decision on the part of the Court. In an unusual move, the Court issued a number of statements on its Twitter account, justifying the use of the expedited procedure.

Indeed, the politics surrounding the case were brought much more to the fore in the Advocate General's opinion than in the final ruling. The Advocate General's opinion noted the importance of the Court's decision in this case, "given Brexit's enormous legal, economic, social and political repercussions, both for the United Kingdom, and for the European Union, and also for the rights of British and non-British citizens who will be affected by Brexit. This is a question, I must emphasise, that is not merely a jurisprudential issue, accessible to a small number of EU-law specialists: the matter referred to the Court may have real significance in the United Kingdom and the European Union itself."

The Advocate General also dismissed the idea that the Court should evade answering a question of special sensitivity for a Member State solely because the answer may be read from a political, and not a strictly legal, perspective, by one or other party.

The opinion went on to note that the timing was critical because "the relevant time to dispel doubts as to whether the notification of the intention to withdraw is revocable is before, not after, Brexit has occurred and the United Kingdom is inexorably immersed in its consequences." He also stated that the Court's ruling would open the way for parliamentarians in the UK to rely on the possible revocation in order to adopt one position or another when they come to vote on the Withdrawal Agreement.

The UK government argued that an advisory opinion from the Court in such a politically sensitive case as Brexit would entail interfering in the adoption of decisions still being negotiated, which should be taken by the UK executive and legislature.

Judge Fernlund steered clear of the politics, noting merely that one of the petitioners (Joanna Cherry MP) and the two interveners (Tom Brake MP and Chris Leslie MP) would have to vote on the ratification of the Withdrawal Agreement. He also noted the Scottish Court's assertion that they would therefore have an interest in the Court's ruling since it may clarify the options open to them in exercising their parliamentary mandates.

## **CONCLUSION**

The ruling by the Court of Justice comes at a politically sensitive time for the UK. With the House of Commons due to vote on the Withdrawal Agreement and the main parties all split as to how to proceed, the Court has opened up the option – however remote the chances of this being used may appear at the time of writing – of the UK remaining in the European Union under the same terms and conditions as today. It is worth noting that any decision to revoke the Article 50 notification by the UK would probably need an Act of Parliament given the terms of the UK's EU (Withdrawal) Act 2018 and it is unlikely that a UK government would revoke without a second referendum which would also require legislation. Having said that, the Court's ruling will surely be seized upon by those campaigning for a second "People's Vote" on the UK's EU membership.

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