



December 2018

Article 50 is not a "one way street with no exits"

Advocate General Manuel Campos Sánchez-Bordona published on 4 December 2018 his opinion (which, as discussed further below, does not bind the ECJ, which will be considering the same issue as the AG at a later date) on whether, under Article 50 of the TEU, the UK can unilaterally revoke the notice of its intention to leave the EU.

In a thoughtful and concise opinion, the AG concluded that Article 50 is not a "one way street with no exits" and that the UK can legitimately unilaterally revoke, as long as the following four conditions are satisfied: (i) the revocation must take place within the two year period following the notification of the intention to leave, i.e. before the UK's withdrawal agreement with the EU is formally concluded; (ii) the revocation, like the notification of the intention to leave, must be formally notified by the UK to the European Council; (iii) the UK's decision to unilaterally revoke must be made in accordance with the UK's own constitutional requirements; and (iv) the revocation must be made in good faith and cannot constitute an abusive practice.

In reaching his decision, the AG addresses the rules of public international law on the withdrawal of States from international treaties (in particular Article 68 of the Vienna Convention) and undertakes a literal, contextual, historical and teleological interpretation of Article 50 TEU. It is also clear from his Opinion that he realises that this issue is of great importance for reasons other than the jurisprudential, noting "The practical, and not only theoretical, importance of the Court's answer is obvious, 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 only 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 [ECJ's] answer will have the effect of clarifying the options open to MPs when casting their votes [on the withdrawal agreement]".

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Two issues of particular interest flow from points (iii) and (iv) above: in relation to point (iii), the AG opines that revocation would require UK parliamentary approval and in relation to point (iv), if the UK is to revoke in good faith, rather than, for example, for tactical reasons (such as the hope of securing a more advantageous withdrawal agreement in the future), the UK government's stance on Brexit would have to change completely, which in realistic terms would require a second referendum or general election.

The AG's opinion is merely advisory and cannot bind the ECJ (although the ECJ does follow such opinions in the majority of cases). The full judgment of the ECJ on this question will be published at an unspecified future date, although the ECJ has stated that its judges have commenced their deliberations. Given the importance of the judgment, and the short time frame before a withdrawal agreement must be concluded, it is to be hoped that it is published in the very near future.

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