

Brexit: Could The UK Really Unilaterally Revoke Its Article 50 Notification?

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In an [Opinion](#) released today Advocate General Campos Sánchez-Bordona has proposed that the Court of Justice should declare that Article 50 TEU allows for the unilateral revocation of a notification by a Member State of an intention to withdraw from the EU.

The Advocate General's Opinion is not binding on the Court of Justice. Many expect the Court will give an expedited ruling on the matter before Christmas but there is currently no certainty that it will do so at the current time. In 80% of cases the Court will follow the Opinion of the Advocate General unless there is a clear reason to disagree (which cannot be ruled out in the present case) but in the meantime there will be a period of legal uncertainty during which it is entirely possible that the UK Parliament's view of the available options could differ from the Her Majesty's government's and the EU's.

If the Opinion is followed by the Court, it would mean that the UK could, at any time up to 29 March 2019, notify the European Council that it was withdrawing its Article 50 notification without needing the Council's consent, or the consent of any other Member State, to do so. What is more, it is at least arguable that an effective revocation would mean the UK would remain in the EU on the basis of its current terms membership. That said, there are plenty of assumptions in making that argument and the position is not entirely straightforward (as described in our previous [Blog Post](#), [Brexit](#), [Exit from Brexit](#) and [the loss of British Privileges as a legal consequence](#)).

In rendering his opinion the Advocate General takes a more international law tending approach to interpreting the Treaty on European Union than the autonomous approach developed by the European Court of Justice in its case law. We have also described those two approaches in our previous [Blog Post](#).

The Advocate General says that the right to unilaterally withdraw the Article 50 notification is not absolute. It must be notified formally, and must be done "respecting national constitutional requirements". Although the constitutional requirements of the UK are not a matter on which he could opine, the Advocate General mused that, as a result of the [Miller case](#), this would require parliamentary approval. The Supreme Court held in *Miller* that the Prime Minister could not, as she claimed, use Royal Prerogative powers to notify Article 50, which led to the requirement to pass of The European Union (Notification of Withdrawal) Act 2017. There is, however, some disagreement whether she would need another Act of Parliament to be able to revoke Article 50.

One concern of the EU was that a Member State could use a revocation power tactically. In response to that, the Advocate General stated:

"the antidote to the misuse of the right of withdrawal can be found in the general principle that abusive practices are prohibited, established by the Court, according to which EU law cannot be relied on for abusive or fraudulent ends and the application of EU legislation cannot be extended to cover abusive practices by economic operators. That general principle could be applied in the context of Article 50 TEU, if a Member State engaged in an abusive practice of using successive notifications and revocations in order to improve the terms of its withdrawal from the European Union"

In other words, if the UK revoked Article 50 in an attempt to "get a better deal" from the EU27, it would be



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unlikely to be successful. This could theoretically lead to a position where, pending the Court of Justice deciding whether the revocation were effective or not, it would be unclear after 29 March 2019 whether the UK were still a member of the EU or not. If the government were to revoke genuinely intending to remain in the EU, and a subsequent government or Prime Minister changed this policy, even within a few months, it should still be able to do so: the Advocate General is not arguing that there is a prohibition on a country triggering Article 50 again.

There is, it appears, an inconsistency in the Attorney General's Opinion that suggests that revocation would only be possible before 29 March 2019, even if the Article 50 period were extended beyond that. That doesn't immediately make sense, and it is to be hoped that the Court clarifies this point. If that is the case, it makes the case for a second referendum even harder, as it is impossible to hold that second referendum before 29 March 2019.

Speaking from a political rather than a legal perspective, where does this Attorney General's Opinion leave us, assuming that the Court of Justice agrees (this being far from certain)?

The starting point is that nothing has changed. The UK government would need to decide to reverse its policy and advocate remaining in the EU, and Parliament would likely have to pass an Act to this effect before 29 March 2019.

However, the Opinion does move the political dial marginally. It weakens the argument of government that the only alternative to approving the [Withdrawal Agreement](#) and [Political Declaration](#) is for the UK to leave without a deal. If followed, it provides that the UK can revoke Article 50 up to the last minute to avoid the immediate consequences of a no-deal Brexit (in principle an Act of Parliament could be passed very quickly). This may mean that MPs who are dubious about the Withdrawal Agreement, but less keen on remaining, become more supportive of Theresa May on the basis that their hand has been weakened. Conversely, those who would prefer the UK to remain in the EU may be emboldened on the basis that the Opinion reduces the risk of an "accidental" Brexit, i.e. voting down the Withdrawal Agreement is less likely to result in the UK leaving with no deal (otherwise the default position as a matter of law). But there will still be many obstacles for such a group to surmount before remain becomes a serious possibility.

Of course, the Court of Justice may take a different view to the Attorney General. In the soap opera that is Brexit, who would be bold enough to bet against that happening? If the Court does follow the Attorney General's Opinion then it's possible that this case may end up changing the eventual outcome, but it would be premature at this stage to assume that this case will inevitably be more than a mere footnote (however intriguing) in the annals of legal history.

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