Advocate General in Wightman says in his Opinion that Article 50 Notification can be Unilaterally Revoked

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The opinion of Advocate General Campos Sánchez-Bordona provides some useful insight into the issue of revocability of the Article 50 notification made by the UK Government in March 2017. This is the first indication of the possible outcome in this case, ahead of the Court of Justice judgment due next week on this issue. The AG Opinion is not binding, however, and the Court is free to disagree with the opinion and the reasoning of the AG. Therefore, although it provides some helpful guidance, it is worth considering that this is an opinion arrived at independently of the judges in the Court and is non-binding. Nevertheless, it may be influential upon the decision of the Court as it will be considered by the judges prior to the issuing of their judgment.

There are a number of issues dealt with by the AG in his Opinion:

1. The admissibility of the case (raised by the UK Government who claimed that the question was theoretical and therefore inadmissible)
2. The compatibility of unilateral revocation with international law, in particular the Vienna Convention
3. The issue of unilateral revocability as a matter of national sovereignty
4. Conditions or restrictions upon the ability of a Member State to revoke Article 50 notification once it has been issued.

Admissibility issue

The main argument of the UK Government was that in their opinion, the matter before the CJEU was inadmissible due to it being a theoretical issue, and not one that was the subject of a genuine dispute before a court of an EU Member State. The AG dismissed this argument rather succinctly. There were several points of note in his approach here.

Firstly, a lot of emphasis was placed upon the referring court's decision to refer the case – if it had considered it inadmissible, then it would, in his view, not have referred it in the first place. Arguments were put in the Scottish Court of Session and in a subsequent appeal by the UK Government regarding the inadmissibility of this issue for an Article 267 reference to the CJEU, and they had been unsuccessful.

In addition to this, the AG identified that there was in fact a genuine dispute between the applicants and the UK Government regarding the question of revocability, and the question referred was central to that dispute. The UK Government had argued that the matter was purely academic, as the UK Government had no intention of revoking the Article 50 notification. However, the AG argued that the question had relevance because this concerned an ongoing process, as the Article 50 process had been activated and would still be active until March 2019 under the current arrangements. He also argued that the practical "legal, economic social and political repercussions"[1] of the ongoing process prevented the question from being considered to be merely theoretical. It would also have the effect of informing the UK Parliament of an available option. Several of the applicants were members of parliaments who would be responsible for voting upon the Withdrawal Agreement[2], it would allow them to take an initiative to move towards that option within their respective parliaments.

The fact that the withdrawal of the UK from the EU had not yet taken place was not relevant here, as an *ex ante* resolution to this issue was relevant in this situation. This is mainly because once the UK's withdrawal from the EU has taken place (at the very least by operation of law on the 29th of March 2019), this question becomes academic because revocation would definitely be impossible at that stage.

Compatibility with Vienna Convention

The AG dealt with the compatibility of this issue in international law. I will leave it to scholars of international law with more expertise than me to dissect the reasoning here, but in summary the AG identified the relevance of Article 68 of the Vienna Convention which identifies that a notification of withdrawal from a treaty may be revoked at any time up to the point that it comes into effect. The AG identified that this was the point at which the Withdrawal Agreement had been

properly ratified. Therefore revocation could take place before all the procedures for ratification had taken place, including the vote in the UK Parliament and the European Parliament, as required by Article 50 itself. The manifestation of State Sovereignty in being able to withdraw from international treaties was also manifest in its ability to revoke that notification up to the point that it came into effect.

Revocation of "intention" and not "decision"

Probably the most compelling argument as to why the UK retained the ability to change its mind and revoke the Article 50 notification came in the section of the AG's Opinion on the interpretation of Article 50 itself. Article 50 provides for a Member State to notify the EU Council of its ***intention*** to withdraw from the European union, and not it's ***decision*** to do so. A statement of future intention is exactly that, and cannot be argued to bind the statement maker into that course of action if they subsequently change their minds. He analogises the situation to one where, had the UK's notification not been "in line with constitutional requirements", then such notification would have been unilaterally revoked through not having the appropriate foundation to satisfy the requirements of Article 50.

Conditions Attached

Although all the above appears at first glance very encouraging for the applicants in that it supports the revocability of the Article 50 notification by the UK, the unilateral nature of the revocability was, according to the AG, subject to conditions.

The AG has pitched an interesting compromise that appears to be an attempt to steer between the two opposite positions on this matter. On the one hand, there were concerns in the submissions from the EU Council and the Commission to the Court regarding the potential for abuse of the Article 50 process. They were that any Member State might be able to use the Article 50 process and the threat of withdrawal as a negotiation tool to achieve other ends, or abusively to extract concessions from the other EU Member States through its use as an economic threat. They argued that it was essential to require the unanimous agreement of the EU Council for a revocation to be effective. There is also the opposite possibility of one of the remaining Member States using unanimity as a way of extracting unrelated

concessions from the Member State attempting to revoke, effectively being able to use a veto on the attempted revocation. His Opinion sits between these two possibilities, and confirms that he considers that the Member State should be able to revoke unilaterally, but subject to certain conditions. They would more accurately be described as 'safeguards', as they operate to avoid the possibility of a Member State (either the withdrawing State or a remaining State) acting abusively with regard to the Article 50 process.

Firstly, a requirement of revocation would be that it must occur by formal act to EU Council. In the case of the UK, it is reasonable to assume that this would be by letter from the Prime Minister, in the same way that notification of intention to withdraw was by this method. The likelihood would be that, in line with the *Miller* judgment,[3] an Act of Parliament authorising the Prime Minister to do so would be required.

This is in line with another of the conditions, that a Member State could only revoke their Article 50 notification if it was "in accordance with its own constitutional requirements", which mirrors the requirements of Article 50(1) TEU for notification. The AG commented that this would require an Act of Parliament in the UK's case.

Thirdly, the revocation must be within the time limit set out in Article 50 (2 years), and therefore there is a time constraint that in the case of the UK, is close to running out. Presumably the right to revoke would also extend in the event of the Article 50 period being extended beyond the 2 years as per Article 50(3). This also underlines the importance of the need for the revocability question to be answered *ex ante*, as it is clear from this that any challenge regarding revocation would be legally ineffective after the time limit has expired.

In addition to this, another time limit has been referenced in the AG's Opinion. He has indicated that any revocation would also be ineffective if it occurs after the process for ratification of the Withdrawal Agreement has been completed. This would suggest that once the UK Parliament has passed an Act of Parliament ratifying the Withdrawal Agreement and the European Parliament has voted in favour of the agreement, that it is no longer open to the Member State to revoke. This raises additional questions, because although we are fairly close to the deadline for the UK, it was always possible that the

Withdrawal Agreement is concluded before the expiry of two years, and possibly could have been agreed much before then. However, this is in line with the requirements of the Vienna Convention, which states that withdrawal from a treaty shall only be revocable up until it takes effect.

Finally, the AG also mentioned the requirement of 'good faith'. This addresses the Commission and Council's concerns regarding the abuse of the Article 50 process. Any Member State found not to be acting in good faith through, for example, evidence of the Member State trying to manipulate the Article 50 process for ulterior purposes, would find that their attempted revocation would not be valid. The AG argued that this would, through the use of the appropriate legal instruments, be an effective safeguard against abuse of the Article 50 process, along with the requirements that the process must be in line with the Member State's own constitutional requirements, and therefore unanimous agreement of the EU Council would be unnecessary. These would be an effective safeguard against the actions of, for example, a Head of Government attempting to act in a tactically abusive way with regard to the use of the withdrawal notification.

The Opinion of the AG demonstrates an attempt to navigate through an issue upon which Article 50 itself is silent, whilst at the same time dealing with the concerns regarding its abuse. If this is followed by the CJEU in its judgment, then it will show a compromise between the two extremes and allow MS to unilaterally revoke, while maintaining safeguards. Most importantly, it places an additional option on the table for MPs deciding upon whether to ratify the UK Government's negotiated Withdrawal Agreement. It seems that in these times of such political uncertainty, legal certainty provides the UK Parliament the opportunity to act in what it sees as the best interests of the UK.

References

[1] AG Opinion, paragraph 41

[2] For example: Andy Wightman is an MSP, Joanna Cherry is an MP, and Alyn Smith is an MEP

[3] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5