

# Brexit: Revocation of the Article 50 notification of withdrawal may be Unilateral

**Ralph Smith MBE**

Gómez-Acebo & Pombo

**Angel Carrasco**

Gómez-Acebo & Pombo

---

On 10<sup>th</sup> December, the CJEU issued a judgement that the UK is entitled to unilaterally revoke its notification of intention to withdraw from the EU following the Advocate General, Manuel Sánchez Campos-Bordona's opinion of 4th December.

Despite the apparently clear provisions of Article 50.3 of the Treaty of the European Union, at the instance of the Scottish Court of Session, the CJEU introduced yet another potential outcome to the already congested list of possible outcomes of the Brexit process. Citing the 1969 Vienna Convention on the Law of Treaties (of which neither the EU nor curiously, UN Security Council permanent member, France, is a signatory) the EU's Attorney General concurred that "notifications of withdrawal from an international treaty may be revoked at any time before they take effect" thereby providing hope to those in the UK who would like to see the UK's Brexit ambitions abandoned. Further arguments were given in support including the fact that the Article 50 notification procedure is by its nature unilateral, and only serves to notify an "intention" - rather than a decision - to withdraw. Perhaps more persuasive, particularly as *Brexit Day* gets ever closer, are the arguments of political pragmatism: That making an agreement is not necessarily a prerequisite for withdrawal and that if the EU were to reject a unilateral revocation of the Art 50 notification, this could have the perverse result of forcing withdrawal upon a member state nation, against its wishes. The opinion argued that it offers "an especially appropriate interpretive approach" in the hypothetical situation of a unilateral revocation of the Article 50 notification.

Despite the appearance of seeking to offer a desperate “last-minute” escape route from the uncertainty of Brexit, the reality is that the decision has a legal basis. Even without express support from the EU Treaties, the common law of legal transactions “of all civilised nations” leads to this same conclusion. The waiver of a right or a legal status and the withdrawal from a treaty are *unilateral* acts, albeit receptive, but nevertheless not requiring acceptance by the other party. In acts of this type, the maker of the declaration is entitled to revoke, provided that this happens before it takes effect; before the end of a fixed term or a precondition is satisfied, even if the other party is aware of the original notification. The other party does not enjoy an acquired right to force the final intended effect (Brexit) to occur. For this to be the case, the Brexit withdrawal would have to have been a *bilateral* act, which in turn would have required that the EU must have provided consideration. That is to say that the EU must have paid for the UK to leave the Union. This is not the case here and the fact that the (now abortive) negotiations have been costly for the EU would not constitute contractual consideration in international law.

Neither is it relevant that parties may not be signatories of the Vienna Convention on the Law of Treaties as various different international courts and tribunals have always maintained that the Convention forms part of international law applicable to “all civilised nations”.

The decision on unilateral revocation is however subject to certain conditions and limits such as the formal notification of the revocation to the European Council before the end of the notification period, and that national constitutional requirements are respected. Likewise, principles of good faith and sincere cooperation must be preserved, in order to prevent absurd situations such as the unilateral revocation of the Article 50 notification being immediately followed by another Article 50 notification. The constitutional observance condition is also not trivial, because some might argue that if the UK were to revoke the Article 50 notification this would not be constitutionally consistent with the electoral mandate from the referendum upon which the notification itself was founded.

Although this scenario is at present considered unlikely, at face value, revocation of the Article 50 notification would appear to offer yet another theoretical route in the already highly complex Brexit labyrinth.