

Where our Brexit negotiators are going wrong – and it's not just fishing!

When anyone says they want “a deep and special relationship” you know they are only looking at their side of negotiations and are oblivious of the other side's position.

The EU isn't in a position to give us such a relationship. The project must come first – in other words, the first duty of the European Commission and Parliament is to preserve the unity of the remaining 27 members. They don't want other countries leaving and expecting a special deal.

The UK Government also states that The same rules and laws will apply before and after Brexit. There is nothing wrong in moving the EU *acquis* across into domestic legislation through the European Union (Withdrawal) bill for areas that apply only within the UK. It is a different matter with any legislation which include a degree of interaction with EU27 – fisheries policy, for example. We may point out that we are maintaining regulatory convergence but the laws are not compatible from the EU prospective because in March 2019, we will no longer be an EU member state.

At the bottom of the majority of EU regulations it states: *This Regulation shall be binding in its entirety and directly applicable in all Member States*. As we will be no longer a member the regulation is neither binding nor applicable on the UK.

So while the two highlighted statements sound convincing at first glance, they are not and the fact that our negotiating team keeps repeating them shows that in reality, they are very vulnerable.

The Transitional deal

The above comments apply equally to the proposed two year transitional period. Because of the time which has already been lost, many in the establishment are hailing this as an important step forward but in reality, they have failed to appreciate how catastrophic the terms of such a deal are likely to be.

Fishing for Leave believes that only when the negotiations reach the point when a transitional arrangement can be discussed – which David Davis expects us to have reached by end of March 2018 – will it become apparent just how severe the conditions that will be imposed on the UK actually are.

The European Parliament has made its position clear in this document. There will be no UK representation in any EU institution during that period, but we will have to accept the full rigours of EU institutions, and who is to say it will only last two years? We could well find ourselves no further forward in March 2021. Far from being Brexit, these two years (or perhaps longer) could well be the worst two years of our involvement with the EU project.

Let us consider some of the evidence for this:-

Firstly, from the House of Commons Department for Exiting the EU Committee 25th October 2017 (*Our comments in Italics*)

Q67 **Joanna Cherry:** Can I go back to the transitional period or the implementation period? What is your understanding of the legal basis for a transitional deal or an implementation period?

Mr Davis: The presumption we have been working on is that it comes under the Article 50 proposal. It was raised with us by the Commission. The European Parliament sees it in those terms. I am assuming the Commission legal service does. But in many ways it is a question almost for the Commission rather

than me.

If you are to negotiate, you have to know the legal basis under which you are working and not leave it to the other side.

Q68 **Joanna Cherry:** Do you have any legal advice of your own as to the basis of a transitional deal or implementation period?

Mr Davis: I am not going to share the legal advice for the reason I gave earlier: that is the convention. But our belief is that it fits under Article 50.

Q69 **Joanna Cherry:** Legal advice exists, and it is your belief that it is under Article 50.

Mr Davis: I am not going to be drawn any further on that. I said I believe it is going to be under Article 50.

As Article 50 comes from the Lisbon Treaty – TEU, it will cease to apply on 30th March 2019, so the transition period can be negotiated under article 50, but the implementation of the transition period will have to be under another EU legal basis.

Q70 **Joanna Cherry:** Article 50 does not actually say anything about transitional deals or implementation periods.

Mr Davis: Article 50 does not say very much about anything, if you read it. It is the blandest and unhelpful phrase you are ever likely to come across, but there we are: that is that.

Article 50 is clearly laid out, and does not make reference to a transitional period.

Q71 **Joanna Cherry:** What it does make clear is that, during any period of deferred withdrawal, the treaties would continue to apply, so if we went into a period of deferred withdrawal under Article 50 we would still be in the single

market; we would still be in the customs union; and we would still be under the jurisdiction of the European Court of Justice. That is correct, isn't it?

Mr Davis: My response to that is the same as my response to Mr Bone: we are not looking for deferred withdrawal; we are looking for an implementation period.

If that is the case, whether you call it a transition deal or an implementation period, the bottom line is that it will not be covered by Article 50 because, along with the rest of the EU treaties, it will cease to apply on 29th March 2019

Q72 **Joanna Cherry:** But if it is the case that, as a matter of law, all you could have under Article 50 was a deferred withdrawal, we would not be leaving on 29th March 2019, would we?

Mr Davis: That is not what we have been negotiating for. The phrase "deferred withdrawal" has never been used to me by the Commission. The phrase they use is "transition period". Our term of art is "implementation period".

(FfL believes Joanna Cherry is correct)

Then we move onto who will actually be running the country during the transitional period

Q58 **Mr Rees-Mogg:** To follow on from Mr Bone's question, the worry is when we get to 29th March 2019 we stay under the auspices of the European Court; we are still in the customs union; we accept new rules as they come through; and we keep on paying money with the promise of a trade deal on the never-never.

We are still therefore within the European Union for a further two years. All that has happened is the endpoint has been delayed and the uncertainty in 2021, which the aim is to avoid, is just as great—but we have stayed in the European

Union for two years longer and not achieved what we are aiming for.

Mr Davis: There are ways around that, but, if you forgive me, I am not going to detail them here today.

Q89 **Mr Djanogly:** During that period, will the UK have to accept new EU laws made during that period?

Mr Davis: One of the practical points of this, which anybody who has dealt with the European Union knows—as you will have done, I guess—is that it takes two to five years from inception to outcome for laws to make it through the process.

Anything that would have impact during those two years we are talking about will already have been agreed with us in advance. Anything that happens during it will be something for subsequent discussion as to whether we propose to follow it or not.

This is another area where FfL believes Davis is wrong. As far as we understand things, it is the acquis which has passed onto the UK statute books on or before 29th March 2019 that will be covered by the European Union (Withdrawal) Bill, not work in progress, that is moved across to domestic legislation, and as cherry picking is supposedly not on, Davis's answer is unusual, and Rees-Mogg and Djanogly were in order to ask those questions.

Michel Barnier's comments to House of Lords Committee 12th July 2017

1. *Barnier made it quite clear that the transition period would see us under the thumb of the ECJ:-*

"You talked about the risk of divergence. It is a risk, not a certainty. The repeal Bill is meant to bring EU legislation into British laws, and that is very good and important, but what will happen D plus 10 or D plus 20? How will your law and

your standards develop?

That period will be set in a framework, a transition period, and then there will be a new relationship. I cannot give you a time more precisely than that. I cannot even tell you the nature of it. All that I can say—and I can say this in the name of the EU—is that during that period we will maintain, in relation to the internal market, the regulatory architecture and supervision of the Court of Justice.”

The European Parliament said exactly the same thing three months earlier:-

From European Parliament resolution of 5th April 2017

Transitional arrangements

28. Believes that transitional arrangements ensuring legal certainty and continuity can only be agreed between the European Union and the United Kingdom if they contain the right balance of rights and obligations for both parties and preserve the integrity of the European Union’s legal order, with the Court of Justice of the European Union responsible for settling any legal challenges; believes, moreover, that any such arrangements must also be strictly limited both in time – not exceeding three years – and in scope, as they can never be a substitute for European Union membership;

Michel Barnier raised further complications about the transitional deal:-

- *We will be able to apply absolutely no pressure on the EU during this time.*

Speech by Michel Barnier at the press conference following the third round of Article 50 negotiations with the United Kingdom

Brussels, 31st August 2017

“...but it also wants to have these standards recognised automatically in the EU. That is what UK papers ask for. This is simply impossible.”

▪ *Even a transitional deal would require a treaty*

Speech by Michel Barnier in front of the Committees of Foreign Affairs and the Committees of European Affairs of the Italian Parliament

Rome, 21st September 2017

The dialogue we are having here today – as in all national parliaments – is essential because our future partnership with the United Kingdom, and its legal text in the form of a treaty, will have to be ratified by you, when the time comes.

Once again, the future of the Union is our priority, not Brexit

Finally, the implication for fisheries

FfL believes the Government is heading into uncharted waters; creating problems for which they and not the EU are responsible.

1) Article 50 takes us cleanly out of the EU and the CFP, with no legal repercussions.

2) The European Union (Withdrawal) Bill takes us back in all but name if we include the fisheries regulations of the *acquis*. What we have just left, our own UK Parliament intends fully to take us back into again.

3) The proposed two year transitional/implementation period will require a treaty and during that time, we will be subject to the CFP.

Furthermore, FfL believe that it wouldn't just be fisheries which would be affected by this “out and in” process, which could cause us to fall foul of the Vienna Convention on the

Law of Treaties, a notoriously grey area, which could bog down the system with lengthy and complex legal cases.

While it is the intention of HMG to produce a Fisheries Bill, we don't know what will be in the Bill. Can it be made watertight? This could be difficult in view of the EU stating there can be no cherry picking in any transitional arrangement. We can be sure that the EU would not allow the present fishery arrangements to be exempted from such a deal and worse still, EU control of our fisheries could become permanent if the Government does not change course and exempt the EU fisheries regulation from the European Union (Withdrawal) Bill.