

# Confusion over our legal status in the transition period

During the House of Lords select committee on 1<sup>st</sup>. May 2018, the Earl of Kinnoull said to David Davis Brexit Secretary of State, **“I want to come back to what you said about the European Union not being able to agree a treaty with us while we are still members. I have been troubled and scratching my head over that”.**

He is not the only one. Article 50, the mechanism which secures the UK departure from the EU as from 30<sup>th</sup> March 2019, raises two serious problems.

1) The EU treaties, and thus all its regulations will cease to apply to the UK as from 30<sup>th</sup> March 2019.

2) The EU can't sign a Treaty with the UK while the UK is still a Member, meaning the earliest being 30<sup>th</sup> March 2019.

Put together, these two conditions cause serious problems, because if you compare the procedure in joining the then EEC in 1972, there was an orderly procedure. First came the signing the treaty of membership on 22<sup>nd</sup> January 1972, and then followed the ratification process, resulting in the European Communities 1972 Act, which ensured everything was ready to commence membership on 1<sup>st</sup> January 1973.

The leaving process, by contrast, is topsy-turvy. The procedure has been reversed. Taking evidence from David Davis during the Lords' session and the House of Commons select committee of 25<sup>th</sup> April, you can understand why the Earl of Kinnoull is scratching his head. Mr Davis appears to be

contradicting himself.

Before the House of Commons, he stated that there will be several votes on the outcome of the negotiations with the first vote being what has been referred to as the "meaningful" vote: a vote on the overall treaty and agreement in both Houses. We will do this before the European Parliament will vote on it. Here are some of the questions:-

*Q1388 **Chair:** Will the document on the future relationship be a political declaration or a draft treaty?*

***Mr Davis:** It will be at that stage a statement of the Council. I would not imagine we will have legal text at that point.*

*Q1389 **Chair:** What status will it have if it just a statement of the Council?*

***Mr Davis:** Nearer to political declaration than draft treaty. It will not be in draft as a legal text at that stage.*

*Q1390 **Chair:** It is likely to be a political declaration, and a political declaration is not a treaty.*

***Mr Davis:** No, it is not a treaty. Again, to remind you of previous evidence, Mr Chairman, when I have appeared in front of this Committee I have reminded you that the requirements of European law are that they cannot sign a treaty with us until we are a third country. That means they cannot sign a treaty, which is the only point at which a treaty becomes in any way binding, until the first days of April or the last day of March in 2019.*

*Q1391 **Chair** How can Parliament set any store by it if it is asked to vote on this whole process when the really important question of our future relationship is merely a statement of the Council in the form of a political declaration and not a draft treaty?*

***Mr Davis:** That does not mean the Council will not view it as*

*binding. After all, each of the agreements we have come to in December and March are seen as binding. They are not legally binding but we view them as completely politically binding. (By International Law, not EU Law)*

In summary, Mr Davis told the House of Commons that there may be more than one treaty, for a start. It is impossible. We do not know what the full structure of the treaty will look like: whether security and defence will be separate from the future economic partnership. It is quite possible. Some of these things will have substantive domestic effects, so they will of course come with Acts of Parliament before the House as well.

However, he told the House of Lords that we have to have everything pretty well nailed down even legally at the beginning of the implementation period. It will not be ratified, because they cannot sign a deal with us until we are a third country, which will be shortly after formal departure from the Union, but the ratification process will also take place during that period. To achieve this, the agreement must be basically complete by October, at least in joint report-type terms, and fully legally watertight by the time we leave.

He added that signatures will not be put to the treaty until after Brexit Day because *"they can only sign with a third party, as Lord Jay knows better than most, I guess. So I will aim to conclude the negotiation, if I can get to that point by then, so that they can sign and then start the ratification process. Remember that ratification will require a brand new European Parliament, which will only just be being elected at that point, and a brand new Commission, and almost certainly—for some of it at least, if not for all of it—it will be a mixed agreement, so it will go round the Parliaments of Europe. So there is quite a lot to get done in ratification terms. We absolutely have to have ratification concluded before the implementation period is over, otherwise we will be in a sort of limbo."*

We need to remember that ratification is the action of signing or giving formal consent to a treaty, contract, or agreement, making it officially valid. That is , valid according to EU Law. An example of this took place with Denmark over Maastricht and Ireland over Lisbon, where EU law did not apply until after ratification yet International Law did – and of course, under the proposed implementation period, we would expect to be under the ECJ, so what would be the legal basis?

In summary, like Lord Kinnoull, we are all scratching our heads, because it is utter confusion. It needs some bright lawyer to pin Davis down to what is going on. I have only taken this line of investigation because I questioned the legal right for the UK to have exclusive use of the 12 nautical mile fishing limit during the implementation period, fearing that we could run the risk of EU vessel owners, not only fishing inside that limit, but taking the UK to court, as happened in the Kent Kirk case in 1983.