

Is the Withdrawal Agreement Legal?

Doubts have recently been expressed about the legality under EU laws of the backstop in the Withdrawal Agreement (WA). Could this be the 'tip of the legal iceberg' and much more of the Agreement be unlawful or illegal? Significantly, the Withdrawal Agreement does not appear to have been independently reviewed for veracity, fitness for purpose and compliance with the treaties and laws of the EU, nor with international law. Consequently, the extent of any illegality is unknown. But as the WA is such a complex, politically-charged document with potentially wide-ranging ramifications, it would be reasonable to have cautionary misgivings.

The Withdrawal Agreement appears to conflict with EU Treaties and law

Article 8 of the Consolidated Treaties of the EU states:

- 1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.*
- 2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.*

The above can be seen as complementary to other treaty obligations relating to human rights, in particular those concerning commitments to full employment (Article 3 (3)). So

how well has the EU done in complying with these principled treaty requirements for peace, prosperity and political stability?

Any reasonable person would likely conclude that the EU's behaviour in 'negotiating' the Withdrawal Agreement was more akin to that of a hostile power, determined to permanently subjugate a friendly neighbour into a powerless vassal state. Perhaps that was the intention all along – 'might is right'? There are plenty of reports, including from British ministers, that at least some of the EU officials negotiating the draft Withdrawal Agreement were acting in bad faith, seeking to 'punish' the UK for leaving rather than seeking a cooperative and mutually beneficial agreement.

The Backstop and other WA content breaches Article 50

There is also evidence that the scope of negotiations went far beyond the intentions of Article 50. Ambassador (rtd) Leonidas Chrysanthopoulos, Former Secretary General of the Black Sea Economic Cooperation Organization, was on the inside of the negotiations to include Article 50 in the Lisbon Treaty. He has revealed that Article 50 was only intended to cover financial arrangements for a Member State leaving the EU. The rest of the Withdrawal Agreement, including the backstop, is outside the intended Article 50 scope.

Article 50 of the Consolidated Treaties of the EU states:

- 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218.*

At most, the backstop could have been included, as non-binding, in the Political Declaration which accompanies the Withdrawal Agreement. This applies to other content of the Withdrawal Agreement which covers arrangements for after the UK's legal departure from the EU. This additional complex, confusing, ambiguous and unworkable content can only be present to pressurise us; to exact a heavy 'price' for leaving; and to coerce others into not leaving the EU.

Keeping Us in the Dark

The Withdrawal Agreement includes extensive cross-references to EU legislation, apparently without a clear order of precedence if there is a conflict or contradiction. The full ramifications are thus uncertain. This is similar to secret clauses in treaties, with the added problems that the EU can continue to add more potentially unlawful requirements. And of course, once the backstop is triggered, the UK cannot unilaterally leave.

In addition to the lack of an independent review of the Withdrawal Agreement's legality, there does not appear to have been any risk or impact assessment. Such assessments would normally include potential mitigation measures. Impact assessments are required by the European Commission's own guidelines for developing new laws. If such assessments had been carried out and acted upon, the Withdrawal Agreement might look very different.

Independent and Authoritative Review of the WA

Even at this late stage, the Withdrawal Agreement should be independently, authoritatively and transparently reviewed for veracity, fitness for purpose and compliance with the treaties and laws of the EU, and with international law. Subsequently, the WA should be redrawn to incorporate the conclusions of the

review. However, given the EU's track record of ignoring its own laws when it suits it this is unlikely. During any review and redrafting some sort of 'temporary' measures would be required in order to comply with the Consolidated Treaties of the EU. To be lawful, these measures (possibly through the use of legal fictions) would need to be intended to maintain peace, prosperity (including full employment), and political stability.

So, if the EU were to lawfully comply with its own treaties and laws, the UK could be enjoying frictionless trade as at present, minimum disruption in leaving the EU on 29th March 2019, and be asserting its national sovereignty, following a democratic political agenda as a free country.