

The continuing relevance of Article 127 of the EEA Agreement

By Professor George Yarrow

Last Thursday (29th March 2018) was the last day on which the Government could have given formal notification that it wished to withdraw from the European Economic Area Agreement (EEAA) on Brexit Day (29th March 2019), in accordance with Article 127 of the Agreement. As it has consistently indicated was its intention, the Government did not send a notice of withdrawal to the other parties to the Agreement. This raises the immediate question: how do things stand now?

The first thing to say is that the earlier situation has been changed somewhat by what appear to be mutually agreed provisions in the draft Withdrawal Agreement for a post-Brexit transition or standstill period. Article 124(1) of that document stipulates that: *"... during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly."* Since the EEAA is one of those international agreements, it is clearly envisaged that UK will continue to be bound by it during the transition, subject only to the consent of Iceland, Liechtenstein and Norway. That consent can be confidently expected, the EEAA being an existing free trade agreement with the UK, a major market for Iceland and Norway.

If the draft Withdrawal Agreement, inclusive of Article 124(1), is eventually ratified, there will be no concurrent UK withdrawal from the EEA on Brexit day. The UK will remain an EEA participant throughout the transition period and the

deadline for the notification of any future withdrawal will be put back until 31st December 2019, one year ahead of the projected end of the transition. By then the prospects for success in achieving the kind of longer-term settlement sought by the Government (whatever that might turn out to look like) will be clearer. And at that stage the Article 127 issues will need to be faced again, albeit in different circumstances.

The 'change in circumstances' point is important here. It is to be recalled that the Government's view so far has been that the EEA Agreement would automatically cease to be applicable to the UK upon withdrawal from the Treaty of Lisbon. I have argued since June 2016 that this view is wrong: there is no text in either Treaty which says as much and the view is only sustained by speculative interpolations that run counter to norms of international law.

More specifically, the Government has repeatedly asserted that the EEAA becomes automatically inapplicable on Brexit Day, either because the UK will not be a member of EFTA or because it will not be a member of the EU. That is, it has been (wrongly) claimed that membership of one or other of these two institutions is a necessary condition for EEA participation. The reasoning behind this view has never been aired publicly, nor has the claimed legal advice on which it is allegedly based ever been disclosed. This has, I think, been a deliberate strategy to avoid Parliamentary scrutiny, by keeping under wraps facts and reasoning that could pose problems for Conservative party management. It was likely judged that achieving majority support in Parliament for voluntary withdrawal from the EEAA would be difficult.

The contrived 'justifications' of automaticity are now being put to the test. Article 124(1) of the draft Withdrawal Agreement indicates that the UK and the EU have agreed that, subject to the consent of the Efta States, the EEA Agreement will be operable/applicable post Brexit, even though the UK

will be a member of neither the EU, nor EFTA. That is, the asserted 'necessary condition' for EEA participation is a fiction: it is simply ignored in the draft Withdrawal Agreement and, if that Agreement is ratified and implemented, what was previously claimed to be impossible will come to pass. Given that, when the time comes to consider Article 127 issues again it is unlikely that the avoidance strategy will be sustainable.

One ironic consequence of the avoidance strategy is the current negotiation around transition arrangements that will see the UK government responding to a referendum sentiment to 'take back control' by ceding yet greater control over its affairs to others. This is now rationalised by those who have contributed most to bringing it about on a 'paradise deferred' argument (and deferred by only 21 months), but that looks for all the world like a doubling-down on wishful thinking.

Whether the withdrawal Agreement is or is not ratified, it will remain the case that there are only two, legitimate ways for the UK to withdraw from the EEA: (a) by the giving of Article 127 notice or (b) with the unanimous consent of all the contracting parties. Given those routes to exit, the EU or any of the other contracting parties (each acting alone and whether an EU Member State or an Efta State) can block route (b). The UK Government will not be able to just slink away from the EEAA.

The EU can, entirely reasonably, insist that the UK honour the international treaty obligations it freely accepted when it signed and ratified the EEAA twenty-five years ago, thereby blocking route (b). Moreover, there are at least two good, immediate reasons for it to do just that: (i) maintenance of harmonised regulation on the two sides of the Irish border and (ii) money. It may also be relevant that a 'strategy of insistence' (that EEAA promises/ commitments be kept) would likely be aligned with the views of majorities both in Parliament and among the UK public. It would not be a case of

EU vs UK, more a case of EU + UK (people and Parliament) majority opinion vs UK minority opinion.

The obvious strategy for the UK from the beginning was therefore for it to seek first to become designated as an EFTA State for EEA purposes, with the full treaty rights and obligations of such States. Compared with designation as an EU Member State with obligations, but without governance rights (the position contemplated by the draft Withdrawal Agreement), this would afford greater sovereignty and simultaneously resolve what are arguably the most difficult of the Irish border problems.

In summary, notwithstanding its relatively low profile in Brexit discourse to date, Article 127 of the EEA Agreement will continue to be a highly relevant factor in the Brexit process. It is a high value card for whichever party holds it in their hand and is willing to use it. The significance of 29th March 2018 is that it was the day that the card shifted from the UK Government's hand to the EU's hand. Thanks largely to the recalcitrant unwillingness of 'ultra Brexiteers' to contemplate compromises with other strands of pro-Brexit opinion and with 'softer' Remainers, it may also come to be seen as the day on which the bell tolled for any prospect of a 'hard' or 'clean' Brexit, not only on 29th March 2019, but also on 31st December 2020.

In contrast, the bell has not yet tolled for an EEA/EFTA Brexit. Although it is getting awfully late in the day for that to happen on 29th March 2019, its prospects for the beginning of 2021 are, if anything, brightening.