

What good faith?

M. Barnier, the EU's chief negotiator, showed a chart of the draft withdrawal agreement at a press conference on 19th March 2018 . It was colour-coded, with green being used to highlight what had been agreed. What struck me on seeing the draft agreement in full, that there was over 170 articles, of which a handful had been added at a later date and denoted by an (a) suffix. It was as if the negotiators had hit a problem, or thought of something else resulting in the necessity of adding something more or less on the hoof.

Article 4a is the first of these and its wording is significant:

Article 4a

Good faith

The Parties shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement. They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.

This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation.

Once this article appeared, the tenor of the standard replies to parliamentary written questions began to change. Take the example below:-

Robin Walker, Parliamentary Under-Secretary of State for Exiting the European Union in part reply to DUP Westminster leader Nigel Dodds – 27th April 2018.

In order to ensure that the UK's interests are protected during the implementation period, a Joint Committee will be established to provide the UK with a means to raise concerns regarding new laws, which we consider might be harmful to our interests. We have also agreed that the whole Withdrawal Agreement will be subject to an article of good faith, ensuring that both sides support each other in delivering the agreement.

Note that the phrase "good faith" appeared in the reply. I am very suspicious about the proposals for the fishing industry during the proposed transitional period, especially relating to the exclusive UK use of the 6 and 12 nautical mile inshore zone. My concerns revolve around the legal authority underpinning the terms for any transitional arrangements. I remember vividly the 1983 Kent Kirk case, where a Danish skipper, who was also an MEP, deliberately brought his fishing vessel inside the British 12 mile limit and started to fish. He was promptly arrested, found guilty and fined. He then took his case to the ECJ, where the verdict was overturned,.

Kirk's behaviour came about because of a loophole which he was keen to exploit. The first derogation giving the UK the exclusive rights expired on 31st December 1982, and the replacement derogation didn't come into force until the 27st January 1983, so ***in good faith***, Danish vessels were not supposed to fish inside that zone, but ***legally*** there was nothing to say that they couldn't. If it wasn't for the weather being particularly bad during January 1983, far more Danish vessels would have fished in that zone.

EU law operates in an unusual way. The Regulations take their authority from the Treaties, and when we joined the then EEC Edward Heath signed the Accession treaty on 22nd January 1972, and thereafter Parliament ratified the treaty through the European Communities (1972) Act, which came into force afterwards – on 1st January 1973.

Now it appears everything is being done the other way round. We currently have the complication of two bills going through Parliament, the European Union (Withdrawal) Bill, followed by the Implementation and Withdrawal Bill , but as David Davis told the House of Lords select committee on 1st. May it is not known yet if there will be a single treaty or two, nor when it will be agreed and signed – perhaps during the transitional period but maybe not until later. .

So we are in a state of utter confusion. There are two particular concerns. Firstly, Article 50 of TEU only allows the EU to sign the treaty when the UK takes up third country status – in other words, ceases to be a member of the EU. Our ministers and negotiators are clinging to the crazy idea that the rules and laws will be the same before and after Brexit. While the rules might be the same, the legal basis will be different as we will not be a member of the EU so its treaties will not apply to us and the EU will not have signed any new treaty with us, which means it is hard to know what legal basis the transitional period will be governed by.

Have the negotiators woken up to this seeming legal black hole? Is this why Article 4a has been included? Unfortunately, the EU doesn't operate on a "good faith" basis, so very little is likely to be legally watertight, which will mean that any disputes will go to the ECJ. .

Certain written parliamentary questions are waiting answers that might throw some further light on this subject, but at the moment, if the proposed 21 month-transitional agreement goes ahead, it will be on a very uncertain legal basis. It is ridiculous that Parliament is being asked to vote on this when so much is still so vague. For all the talk of "good faith", the door will be left wide open to legal challenges, just as happened in the Kent Kirk case.

A parliamentary question, asked only this morning (Thursday 3rd May), proves the point. The reply was vague and not

convincing:-

Peter Aldous (Waveney) (Con)

As this country will be an independent coastal state managing and controlling access to our own waters with effect from 1 January 2021, is the Minister able to provide an assurance that such access for EU fishing vessels will not be part of the Brexit negotiations?

The Parliamentary Under-Secretary of State for Exiting the European Union (Mr Steve Baker)

My hon. Friend will have heard my earlier answer. We are clear that future negotiations over trade must be separate from negotiations over access to waters. There would be no precedent to link the two, and we will continue to take this position in our negotiations on the economic partnership with the EU.

It will be interesting when a reply is given to this written question:-

Mr Alistair Carmichael (Orkney and Shetland):

To ask the Secretary of State for Environment, Food and Rural Affairs, what legal identity is planned to be in place to prevent EU vessels operating inside the Orkney and Shetland 12 nautical mile zone during the proposed 21 month implementation period after EU treaties and the derogation for exclusive use of the Orkney and Shetland 12 nautical mile zone cease to apply to the UK.

Slowly but surely, the holes in our side's negotiating position are being exposed. If the transitional arrangements were scrapped and we instead decided to rejoin EFTA, it would solve these legal complexities at a stroke.