

A FIDE FUNDACION – 5 JUNE 2018 – FIRST PRESENTATION BREXIT – ASPECTS OF THE DRAFT UK/EU WITHDRAWAL AGREEMENT

DRAFT HANDOUT FOR ATTENDEES – PLEASE DO NOT CIRCULATE AND PLEASE CHECK TEXT AGAINST DELIVERY ON 5 JUNE



Cartoon by Matt Pritchett, 1991. With thanks to Matt and to the Daily Telegraph for permission to use the cartoon.

Purpose of seminar: to enable discussion of aspects of the draft Withdrawal Agreement between the UK and the EU, in particular its enforcement provisions. Its importance is that the agreement will govern the relations between the EU and the UK in a transition period from 29 March 2019 until 31 December 2020. It also contains provisions which will outlast the end of the transition period. The Maastricht Treaty exposed a new vein of Euro-scepticism in the UK . But there is no longer any time for brinkmanship. Citizens and businesses now need legal clarity.

A In negotiating the draft Withdrawal Agreement, what is the ideology that lies behind the policy rhetoric ?

1. Some key elements of the UK negotiating position :
 - “Restoration” of sovereignty;
 - Leaving the Single Market and Customs Union;
 - Controlling immigration;
 - An open border with Northern Ireland;
 - A deep and special partnership between the UK and the EU.
2. Some key elements of the EU negotiating position:
 - Autonomy of the Union and its legal order (including the role of the Court of Justice);
 - Integrity of the Single Market (no cherry picking) and the Customs Union;
 - Level playing field;
 - Rights of EU citizens to be protected, whether EU citizens in the UK or UK citizens in the EU.

B What is the broad scope of the draft Withdrawal Agreement?

3. The main topics in the agreement :
 - Part 1 - Common provisions ;
 - Part 2 - Rights of EU citizens in the UK and the rights of UK citizens in the EU, including direct effects;

- Part 3 - Transitional matters (for example, public procurement; data protection; goods placed on the market before the end of the transition period);
- Part 4 - Rights and obligations in a transition period between 29 March 2019 and 31 December 2020;
- Part 5 – financial provisions
- Enforcement provisions in support of these rights and obligations.

C How will the UK give effect to its obligations under the draft WA? The UK parliamentary steps that lie ahead?

- Duty on all parties to give effect to the Withdrawal Agreement (Article 4a);
- The only certainty is that there is no certainty;
- Although the UK has no written constitution, what are the three constitutional stages that lie ahead?
- First, will the principal national legislation designed to give effect to UK exit (*the European Union (Withdrawal) Bill*)(EUWB) be enacted, as drafted by the Government, by the UK Parliament?
- Secondly, will the UK Parliament agree to the terms of the Withdrawal Agreement?
- Thirdly, when will the separate *Withdrawal Agreement Implementation Bill* (WAIB) be introduced by the UK Government into the UK Parliament? What will its substance be?
- Separately, what constitutional requirements are needed to be followed in EU Member States?

D Are the enforcement provisions of the draft Withdrawal Agreement agreed? Why do they matter?

- The enforcement provisions in the draft Withdrawal Agreement are confusing and complex. They are (inevitably) dispersed throughout the text. Their interrelationship is unclear in places.
- The UK's aim is to repatriate enforcement mechanisms and full judicial oversight in order to assert sovereignty;
- The EU's aim is to preserve the autonomy and consistency of the EU legal system.

E Enforcement in respect of cases in the transition period? Is the EUWB compatible with the transition obligations which the UK intends to assume under the Withdrawal Agreement?

- Agreed texts
- Article 122 (1): "*Union law shall be applicable to and in the United Kingdom during the transition period*";
- Article 122(3): "...the Union law applicable pursuant to paragraph (1) shall produce [in the UK] the same legal effects as those which it produces within the Union and its Member States and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union...."
- In the transition period, the roles of the Commission and other institutions is preserved vis-à-vis the UK. Moreover the CJEU will have jurisdiction as provided for in the Treaties;
- Unfortunately, the EUWB is a legislative vehicle designed to deliver a "hard" Brexit. It is not compatible with the draft Withdrawal Agreement.
- If the problems are to be cured in the WAIB, we do not yet know what the policy behind the WAIB will be.

F What will happen to ongoing cases and issues which straddle either side of exit day?

- These cases and issues are under negotiation ;
- The cases include direct actions and preliminary references submitted for a ruling by the CJEU before exit day and new cases brought in respect of facts arising before the end of the transition period;
- Time is short since lawyers and clients need to know - now- how to plan ahead.

G Enforcement in cases arising outside the transition period (Part A)

Special provision for citizenship cases under Part 2 – the first 8 years.

- According to BBC figures in June 2017, there were almost 300,000 UK citizens living in Spain; there were about 116,000 EU citizens living in the UK.
- The provisions on the protection of citizens' rights are agreed and are commendably ambitious . They are intended to last beyond the end of the transition period.
- Consistent interpretation of Part 2 rights – the first eight years.
- The establishment of an independent authority (the Authority) in the UK to monitor the implementation and application of Part 2. It will have equivalent powers to those of the Commission, including the power to bring legal proceedings against the UK.
- A new “specialised Committee on citizens' rights” is to be established. The Commission and Authority will inform the Committee and each other of the implementation and application of Part 2.

H Enforcement in cases outside the transition period and, in Part 2 cases, outside the 8 year period (Part B)

Institutional provisions

- A Joint Committee is established which has responsibility for the implementation and application of the Withdrawal Agreement
- The specialised committee on Citizens' rights is one of a number of committees of the Joint Committee.
- The Joint Committee has power to adopt decisions in relation to any matter covered by the Withdrawal Agreement.

I Enforcement in cases outside the transition period (Part C)

Dispute settlement

- (agreed provision) The parties will seek to resolve matters of interpretation of the Withdrawal Agreement by cooperation and consultation
- (not agreed) if no agreement is reached between the parties, the Joint Committee may seek a preliminary ruling by the CJEU. If the Joint Committee fails to settle a dispute within 3 months, either party may refer the dispute to the CJEU;
- (not agreed) EU power to suspend certain UK benefits during the transition period if the UK fails to fulfil its obligations under EU law.

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