



BREXIT: SUFFICIENT PROGRESS, BUT TO WHERE?

“Sufficient progress” has been declared. The joint UK-EU announcement on 8 December 2017 marks a significant step, and one that the UK government was under huge pressure to make.

The guarantee of no border checks between the Republic of Ireland and Northern Ireland implies a very high level of regulatory alignment between the whole of UK and the EU. This may even require a customs agreement that is very similar to the existing customs union.

While this declaration arguably saves the day for the UK government, it could make the final reckoning all the more difficult, as supporters of a hard Brexit realise that the UK could end up much closer to the EU than they want.

Agreement at the 11th hour

Behind the well-choreographed photos of the UK Prime Minister Theresa May having breakfast with EU Commission President Jean Claude Junker in the early morning of Friday 8 December 2017, stand the three key documents containing the detail of what has been agreed in phase one of the UK’s negotiations to withdraw from the EU (see box on page 2).

This agreement unlocks phase two of those talks, on a transition arrangement and the framework for the future relationship.

Citizens’ rights – hard questions remain

The key point is that EU citizens and their family members legally residing in the UK and vice versa will be able to continue to reside where they are now on the same basis as before.

However, one of the UK’s key demands – that UK citizens remaining in the EU after withdrawal should be able to continue to exercise their existing rights of free movement and establishment – has not been met at this stage. Instead, it has been held over to the second phase of negotiations.

Other areas that were not agreed include future healthcare arrangements and professional qualifications, such as foreign lawyers who practise under their home titles (e.g. English lawyers practicing in Brussels today and vice versa.)

Key Points

- EU Commission declares “sufficient progress” on people, Northern Ireland and money
- Phase two talks on transition and the future relationship to start in 2018 if EU Council agrees
- Key issues on citizens’ rights including difficult issues such as the continued free movement of UK citizens residing in the EU, have been held over to the next phase of talks
- UK courts to maintain ability to refer cases on citizens’ rights to CJEU for eight years
- UK to maintain “Full alignment” with EU rules on single market and customs union as far as they impact Northern Ireland
- UK agrees financial settlement – no lump sum to be paid, and payments to be made years into the future

A key development has been the UK's acceptance that UK courts should be able to continue to make references to the Court of Justice of the EU. The CJEU would have continued jurisdiction in the UK for eight years following the application of the Withdrawal Agreement's citizens' rights part.

The Commission has also accepted that the UK government should have the right to intervene in relevant cases before the CJEU after Brexit. The Commission would have the same power in relation to UK cases.

Northern Ireland – dictating everything else?

Final agreement on Northern Ireland has been carried over into the second phase of negotiations which is likely to start in January.

Key points to bear in mind include that the UK has reaffirmed its “commitment to the avoidance of a hard border, including any physical infrastructure or related checks and controls”. The UK Government has set out a commitment “to protecting North-South cooperation and its guarantee of avoiding a hard border” adding, “any future arrangements must be compatible with these overarching requirements.”

Alongside this, the UK has affirmed “its commitment to preserving the integrity of its internal market and Northern Ireland's place within it” and said that, “in all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market.”

This leads to the critical point of alignment between the UK and the EU. It is perhaps odd that such a substantial and, potentially, UK-level commitment should only arise as a result of Northern Ireland, but that underlines how the Northern Ireland issue may end up dictating the shape of any final settlement.

The UK says that avoiding a hard border on the island of Ireland “should be achieved through the overall EU-UK relationship” but that, in the absence of agreed solutions, “the United Kingdom will maintain full alignment with those rules of the [EU's] Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.”

It is easy to infer from this that if there are to be no border checks between either Northern Ireland and the rest of the UK or between Northern Ireland and the Republic, and that this is to be achieved by “full alignment”, then the UK as a whole will remain highly aligned to the regulatory and customs architecture of the EU.

The wording, in the fashion of much diplomatic constructive ambiguity, is however, somewhat Delphic, which may explain how the parties were able to agree it (e.g. is the UK only committing to alignment if required to achieve all three of North-South cooperation, the all-island economy and the protection of the 1998 Agreement, or does the commitment apply if necessary to achieve only one of those objectives?)

The UK Government seeks to caveat this by saying that the “commitments and principles outlined in this joint report will not pre-determine the outcome of wider discussions on the future relationship between the European Union and the

Key Documents

- Joint report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU ([here](#))
- Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union ([here](#))
- Joint technical note on the detailed consensus of the UK and EU positions ([here](#))

United Kingdom and are, as necessary, specific to the unique circumstances on the island of Ireland.” It is, however, difficult to see an easy way of isolating the Northern Ireland issue from the wider agreement.

Financial settlement – easier than we thought

What started out as the hardest and most controversial issue has faded into the background. The UK has agreed a methodology to calculate its financial settlement with the Commission, and agreed how it will pay it, effectively waiving any argument that, legally, it is not obliged to pay anything after departure.

The key components of the settlement are that the UK will continue to contribute to, and participate in, the EU’s annual budgets for 2019 and 2020, “as if it had remained in the Union (including revenue adjustments)” – keeping its rebate for that period. The UK has also agreed that it “will contribute its share of the financing of the budgetary commitments outstanding at 31 December 2020” (i.e. ‘reste à liquider’ or RAL).

Finally, the UK “will remain liable for its share of the Union’s contingent liabilities as established at the date of withdrawal.” Following the UK’s withdrawal, “payments arising from the financial settlement will become due as if the UK had remained a Member State” which may be many years into the future. The financial settlement will therefore not be paid as a single lump sum.

Interestingly, the joint report notes that “Union assets relating to Union space programmes (EGNOS, Galileo & Copernicus) are not part of the financial settlement” and that “the UK’s past contribution to the financing of space assets could be discussed in the context of possible future access to the services offered.”

The UK’s share of paid-in capital into the European Investment Bank (EIB) will be reimbursed in twelve annual instalments starting at the end of 2019. This is the only part of the joint report where actual sums of money are mentioned – the first eleven instalments will be €300 million each and the final one will be €195 million (i.e. €3,495 billion in total). The UK has said that it “considers that there could be mutual benefit from a continuing arrangement between the UK and the EIB. The UK wishes to explore these possible arrangements in the second phase of the negotiations.” However, “After the date of withdrawal, UK projects will not be eligible for new operations from the EIB reserved for Member States, including those under Union mandates.”

Other issues

A number of other issues were discussed, with both the UK and the Commission clearly feeling that good progress is being made. Those include on Euratom and fissile materials, ensuring continuity in the availability of goods placed on the market under Union law before withdrawal, cooperation in civil and commercial matters, on police and judicial cooperation in criminal matters, ongoing Union judicial and administrative procedures, and on issues relating to the functioning of the Union institutions, agencies and bodies.

Legal status of a future withdrawal agreement

The enforceability of the rights contained in the Withdrawal Agreement is a critical issue.

On the UK side the government has said that it will put the citizens' rights part of the Withdrawal Agreement into primary legislation by bringing forward a "Withdrawal Agreement & Implementation Bill."

On the EU side, the "Withdrawal Agreement will be binding upon the institutions of the Union and on its Member States from its entry into force pursuant to Article 216(2) TFEU." This means that the Withdrawal Agreement will have direct effect in EU law like any other international agreement concluded between a third country and the EU.

What's not covered?

A number of issues were not covered. For example, discussions on transitional arrangements for financial services firms may take place in phase two but this will need to be included in a new set of negotiating directives to the Commission.

Other areas not covered include intellectual property rights (including geographical indications), ongoing public procurement procedures, customs-related matters needed for an orderly withdrawal from the Union, and use of data and protection of information obtained or processed before the withdrawal date.

What's next?

The European Council is scheduled to meet on 14/15 December to decide formally whether to agree with the Commission's assessment that sufficient progress has been made. It seems highly unlikely that the member states will reject the Commission's conclusion.

Assuming that the Council agrees with the Commission, then the way is cleared for the second phase of talks on a transitional arrangement and the framework for the future relationship. The UK has said that it wants a "bold new strategic agreement" that goes beyond existing models, such as the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada but which does not involve joining the European Economic Area and European Free Trade Area (EEA/EFTA) or remaining in the EU's customs union.

Michel Barnier, the EU's chief negotiator, has said that "On financial services, UK voices suggest that Brexit does not mean Brexit – Brexit means Brexit, everywhere. They say there would be no changes in market access for UK-established firms. They say joint UK-EU Rules would be decided in a new "symmetrical process" between the EU and the UK, and outside of the jurisdiction of the European Court of Justice." Michel Barnier seems to be suggesting that he does not believe it is possible to go beyond CETA without becoming a member of the EEA/EFTA.

Michel Barnier's comments underline how challenging the next phase will be. It will take considerable good will to achieve creative solutions to issues of market access in financial services and other areas. If however the UK sticks to the position that it will maintain "full alignment" with the EU on regulatory and customs issues as they relate to Northern Ireland, it may be that the overall final agreement ends up being much less of a 'hard Brexit' than many have imagined.

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Our dedicated Brexit hub contains our latest thinking on the process for implementing Brexit and the implications for businesses, financial services and trade. It is aimed at helping readers to navigate through the complexities of the UK's withdrawal from the EU and to make sense of what Brexit might mean for UK's ongoing relationship with the EU.

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