



The New UK-EU Joint Report on Phase 1 of the Negotiations

Preliminary Views on the Ireland and Northern Ireland Section

Introduction

This paper presents our preliminary views on the Ireland and Northern Ireland section of the Joint Report from the negotiators of the EU and the UK Government on Progress during Phase 1. The document is a *joint report* from the negotiators; it is not an agreement but an authoritative account of the level of agreement reached so far. As such, it provides as agreed evidence of “sufficient progress” to move on to Phase 2 of the negotiations. They have reached agreement on three areas, one of which is “the framework for addressing the unique circumstances in Northern Ireland” but the report is clear that they form a “single and coherent package”. Subject to the principle that “nothing is agreed until everything is agreed” and other listed caveats, the idea is that the commitments will be reflected in the Withdrawal Agreement. The focus here is on the section on Ireland and Northern Ireland although it should be noted that the other sections (for example, on citizens’ rights) have implications too.

The Substance of the Report

Safeguarding and Applying the Good Friday or Belfast Agreement

The centrality of the Good Friday or Belfast Agreement is notable from the beginning, both in terms of protecting it and applying it in practice. The language here is significant. There is clear commitment to its protection *but also* its “practical application on the island of Ireland” and the “totality of relationships”. The Agreement is now at the heart of the negotiations and this is a welcome recognition of its significance; its principles, values and institutions will frame the discussions to come.

The next paragraph recognises that Brexit represents a significant and unique challenge to the island of Ireland. It repeats the specific commitment of the UK to the 1998 Agreement (including the “effective operation” of relevant implementation bodies) and to the avoidance of a hard border “including any physical infrastructure or related checks and controls.” The Report goes on to reference the principle of consent, with regard to the constitutional status of Northern Ireland and stresses its present position as “an integral part of the UK”.

Paragraph 45 notes that the UK respects Ireland’s continuing membership of the EU but also asserts the need to protect the integrity of its own internal market and Northern Ireland’s place within it “as the UK leaves the EU’s Internal Market and Customs Union.”

Paragraph 46 is central to understanding the implications for Ireland and Northern Ireland. It reads in full:

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 United Kingdom and are, as necessary, specific to the unique circumstances on the island of Ireland. *They are made and must be upheld in all circumstances,*

irrespective of the nature of any future agreement between the European Union and United Kingdom. (emphasis added)

The first sentence indicates that agreements reached so far will not “pre-determine” the outcome of future negotiations about the overall EU/UK relationship and are “as necessary” specific to the unique circumstances of the island. However, the next sentence contains the “written guarantee” that the Irish Government was demanding – the commitments made relating to Ireland and Northern Ireland will be upheld “in all circumstances” whatever happens in the broader discussions. In effect, then, this paragraph provides a guarantee that whatever happens next, the commitments and principles agreed now that relate to Ireland and Northern Ireland will hold. This can be read as a limitation to the “nothing is agreed until everything is agreed” language elsewhere and strongly suggests that these commitments should be upheld regardless. But of course the reverse interpretation is perfectly possible too and opens up a recurring question arising throughout this document: How will agreed principles and commitments be implemented and enforced? Note in this respect that the section of the Report on Citizens’ Rights pays particular attention to this point and the status and interpretation of the Withdrawal Agreement itself is of vital significance.

Avoiding a Hard Border?

Paragraph 47 refers to cooperation on the island and to the achievement of reconciliation and the “normalisation of relationships on the island of Ireland”. It lists the various institutions, including the North-South Ministerial Council with its “cross-community provisions”. This is presumably a reference to the need for Ministers to participate normally in the work of the Council, and thus to efforts to prevent its work from being obstructed. The next paragraph simply expands on the UK Government’s support for North-South and East-West cooperation but specifically notes the North-South Implementation Bodies. The paragraph notes that “North-South cooperation relies to a significant extent on a common European Union legal and policy framework”.

Paragraph 49 repeats the UK’s commitments to North-South cooperation and to avoiding a hard border and states that: “Any future arrangements must be compatible with these overarching requirements.” The rest of that paragraph, and the next two, lay out how it is intended to implement these commitments, which can be summarised as follows.

- The first choice for the UK is to “achieve these objectives through the overall EU-UK relationship”
- If that is not possible, the UK will propose “specific solutions to address the unique circumstances of the island of Ireland”
- If there is no agreement on those proposals “the United Kingdom will maintain full alignment with those rules of the 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”
- Again, in the absence of agreed solutions, the UK will ensure that there are no new regulatory barriers between NI and the rest of the UK, unless devolved government agrees to them, and in any case will ensure “unfettered access” for NI businesses to the UK internal market

- Both sides in the negotiation will establish mechanisms for the implementation and oversight of “any specific arrangement to safeguard the integrity of the EU Internal Market and the Customs Union”

The steps outlined in the Report will have a significant impact on the Phase 2 discussions. In translation, these proposals are, first, the UK will try to achieve a relationship with the EU that ensures there is no need for a hard border (the “soft Brexit” option). Second, if that is not possible, it will propose “specific solutions” to address “unique circumstances” (and on the “specific solutions” option its earlier - widely criticised - proposals come back into view). Third, if there is no agreement it will follow any of the rules of both the single market and the customs union which support the Agreement, North-South cooperation and the all-island economy (the “full alignment” option). There is a measure of ambiguity on whether this will be UK-wide or NI-specific alignment in those specific areas. Finally, there is a commitment by both the EU and UK to establish oversight mechanisms to protect the integrity of the EU internal market and customs union. This clearly implies an agreed method of overseeing compliance with EU rules and regulations within the UK in this specific area.

The “back-stop” commitment then is to maintain “full alignment” with those rules of the internal market and the customs union which support North-South cooperation, the Agreement and the all-island economy. There is scope for plenty of interpretative disagreement here, as in other parts of this section of the Report. However, given the overriding desire to avoid any kind of physical border, this is a significant commitment. Again, the creation of mechanisms to implement and oversee this “full alignment” raises immediate questions of institutional design and the form that these mechanisms will in fact take. It is unlikely that the whole UK will submit to this only for the sake of Northern Ireland. A pathway to some sort of special or unique status for Northern Ireland is clearly left open in this document (although it must be noted that the Report also indicates that the UK is planning to leave the single market and customs union). The accompanying Communication from the Commission to the European Council notes the intention to protect North-South cooperation and avoid a hard border “seems hard to reconcile with the United Kingdom’s communicated decision to leave the internal market and the Customs Union”.

Indeed, there is no real indication of how the guarantees of no economic or regulatory borders between Northern Ireland and both Ireland and Britain can be implemented. The UK’s current constitutional and political context, as well as the fact that there is no operational Executive and Assembly, must be factored into any assessment of what is possible as well as desirable. For example, the mutual forms of veto that exist within Northern Ireland’s power-sharing arrangements will make agreement at that level challenging and difficult (given the competing visions in play). At UK level, the current Westminster Government has reached a ‘confidence and supply agreement’ with the DUP, and that party has not been afraid to raise this during these negotiations.

Rights, Equality and Identity

The Report goes on to refer to the birth right of the people of Northern Ireland to choose to be British or Irish or both. It notes that those of the people of Northern Ireland who choose to be Irish citizens, “including where they reside in Northern Ireland”, will “continue to enjoy rights

as EU citizens”. This curious language is presumably meant to suggest that their residence in a non-member state will not prejudice their ability to access their rights as EU citizens - and this raises several complex questions for the next phase of discussions. Paragraph 52 commits to exploring, in the next round of negotiations, “arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits”. There will be hard questions raised in addressing the complexities of this, including for the Irish Government in areas such as citizenship and nationality law as well as on matters of voting rights for citizens who reside outside the state. This section does not, of course, address the potential problem of the inequality in rights that will arise between those born in the North who choose to be Irish citizens and those who choose to be British.

Paragraph 53 accepts that EU law and practice has supported the 1998 Agreement provisions on “Rights, Safeguards and Equality of Opportunity”. The UK makes an important commitment to “ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law”. That is welcome, but there remains ambiguity here and room for interpretative disagreement over substance and form. It does not, for example, explain how this will be done, or how that ambition relates to the current refusal to include the Charter of Fundamental Rights in the body of EU law that will be retained. It does not explain how these will be guaranteed in a system based on parliamentary sovereignty; though it is noteworthy that the Citizens’ Rights section seems to envisage a Withdrawal Agreement and Implementation Act that would in some sense be entrenched. An additional question is raised about EU citizenship rights for Irish citizens in Northern Ireland after withdrawal, as these rights evolve within EU law over time (which rights of citizenship will they “continue to enjoy”?). The paragraph concludes with a commitment to facilitate the work of those institutions and bodies established by the Good Friday Agreement to uphold human rights and equality. This must be read to include not only the statutory bodies but also entities such as the Joint Committee on Human Rights of the two human rights commissions. There is an immediate step that the UK Government could undertake to advance this commitment: The cut to the budget of the NI Human Rights Commission should be quickly reversed and it should be provided with dedicated funding to support work on, for example, a Charter of Rights for the island of Ireland.

The next paragraph deals with the Common Travel Area (CTA). There is recognition that both the UK and Ireland may continue to make their specific arrangements (subject to respect for rights within EU law). The reference to associated rights and privileges raises many questions that are simply not addressed here, and this implies that they are to be worked through in a British-Irish context. The nature of the reciprocal special relationship between the UK and Ireland is in need of much further attention and there is a strong case for enhanced codification to ensure that, for example, the rights of Irish citizens in the UK are protected over the long term. It may well be time for more serious consideration of an equal citizenship right (British-Irish) at UK level in order to guarantee what is often taken for granted in debates around the CTA.

The Report is clear that PEACE and INTERREG funding programmes will be honoured and future support will be examined favourably. Finally, it has been agreed that Ireland will remain the subject of a “distinct strand” of the continuing negotiations between the UK and EU. Much of the detail of, for example, the rights and equality elements of this section of the Report will require the full attention of the negotiators, particularly if credible specific solutions for Ireland and Northern Ireland (that address the agreed unique circumstances) are to be designed and advanced.

Preliminary Conclusions

Although in principle “nothing is agreed until everything is agreed” and this is merely a Joint Report reflecting progress, it is likely that many of the concepts here will shape the final Withdrawal Agreement between the EU and the UK (including those relating to Ireland and Northern Ireland). The UK Government has agreed to bring forward a Withdrawal Agreement and Implementation Bill, and it has given express commitments regarding the status of the Citizens’ Rights section of the Joint Report. However, the Ireland and Northern Ireland issues are also likely to form a key component of the Withdrawal Agreement too, so questions should arise on how this will be addressed as a matter of UK domestic law after withdrawal. Attention should turn in the time ahead both to the substantive issues raised for Ireland and Northern Ireland but also to how any guarantees will be implemented and enforced.

It is important to stress what is not in this Report. We remain concerned that the discussions on the border continue to focus exhaustively on the trade aspects. This means that the human dimension, in terms of the free movement of all people across the island (including those without British or Irish citizenship), is often lost. The narrative also risks neglecting the human impact of Brexit on the island of Ireland and across these islands. In particular, even if there are no static customs or immigration controls on the border, we remain worried that ad hoc checks will lead to racial profiling by immigration officers – a clear case of racial discrimination. We are also concerned that relatively free movement across the island could see the territory of Northern Ireland targeted by UK authorities for particularly severe and intrusive “in-country” immigration checks, including raids on workplaces, increased detention of migrants and further “subcontracting” of immigration controls. The end result could be that Northern Ireland becomes “one big border” with respect to the rest of the UK. Amongst other things, such an approach risks falling outside the accountability mechanisms painstakingly constructed. This would have a negative effect on public confidence in the rule of law and would be profoundly concerning from a human rights perspective. The reference in the Commission Guiding Principles for the Dialogue on Ireland/Northern Ireland to “equivalent standards of protection of rights in Ireland and Northern Ireland” does not appear in the Joint Report. Some important aspects of the Guiding Principles are restated in this Joint Report but without any elaboration, such as the principle that the Withdrawal Agreement should be without prejudice to the “rights, opportunities and identity” that go with EU citizenships for those people in Northern Ireland who are Irish citizens.

The commitments on the border and levels of support for the Good Friday Agreement “in all its parts” are, nonetheless, welcome. Much “political spin” will surround this document but it is hard to avoid the conclusion that the UK Government accepts that Northern Ireland will, one way or another, maintain regulatory alignment with the rules of the single market and the customs union (however this is achieved). This is welcome and goes some way to alleviating some concerns. However, on matters of rights, equality and identity much ambiguity remains and there is scope for consideration of interpretative disagreement, for example: what constitutes “no diminution”? How will the EU citizenship rights of Irish citizens in Northern Ireland be maintained? How will any of this be effectively implemented and enforced given the nature of the UK’s flexible constitution? In significant respects, the hard work is only beginning.