



## Brexit breakthrough – Into ever-deeper fog over both the Northern Irish border and the Channel

Michael Emerson

*How can one possibly explain the enormous range of reactions to the progress reported last week by Theresa May and Jean-Claude Juncker on the 1st phase of the Brexit negotiations?*

The 15-page [joint report](#), agreed on December 8<sup>th</sup> at a breakfast between Theresa May and Jean-Claude Juncker after frantic all-night-long negotiations, seems to have been enough to trigger the passage from Phase I to Phase II. Thus, the European Council on December 14<sup>th</sup> and 15<sup>th</sup> is expected to formalise the opening of negotiations over the future relationship between the EU and the UK. Progress in the three preliminary issues – citizens' rights, the budget and Northern Ireland – is judged by the EU to be adequate to authorise the opening of Phase II.

The tenor of the commentaries ranges from hailing the breakthrough as historic to the very reserved. How to explain and interpret this extreme gamut of opinions?

The most effusive praise comes from Mrs May's senior pro-Brexit colleagues, including Boris Johnson and Michael Gove. They were expressing huge relief that the impasse over Northern Ireland, which had threatened during the previous days to make a train wreck of the whole process, had for the moment been overcome. The sycophantic wording of their praise for the 'victory' of their boss at the breakfast in Brussels also reflects their desperate efforts to patch up their government's image of squabbling and incompetence.

The sceptical voices were observing that the Northern Irish border issue was not settled at all – the can was just kicked down the road. But if so, why did the EU side agree that sufficient progress had been made to pass from Phase I to Phase II? The answer is surely that the EU wants to avoid continued blockage in the discussions at this early stage to the point that a disastrous 'no deal' outcome by March 2019 becomes unavoidable. So the EU compromised. It

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is also true, as the UK has argued, that the Northern Ireland border question is logically part of the Phase II work to be done on the future EU-UK relationship.

So let's look at the three chapters to extract their essence.

### Citizens' rights

This mainly adopted what everyone has known to be the only sensible and civilised outcome, namely that all EU and UK citizens legally resident in the UK and the EU27 respectively at the time of withdrawal will see their acquired status quo rights guaranteed. Discrimination on grounds of nationality in relation to such citizens, including their close family members not yet residing in the UK or EU27, respectively, will be prohibited. Much supporting detail was also agreed, for example on social security provisions.

The provisions for legal enforcement are also important, given the paroxysmal opposition of hard-Brexiteers to any continuing role for the Court of Justice of the European Union (CJEU). There is a jointly agreed aim to provide legal certainty for all concerned. For this purpose, for an eight-year period after withdrawal, in the application of citizens' rights, "UK courts shall have therefore due regard to relevant decisions of the CJEU..." The Agreement will also allow UK courts "to ask the CJEU questions of interpretation" in cases where they consider that a CJEU ruling is necessary. The system will further be supported by the exchange of case law and regular judicial dialogue. So degrees of pragmatic compromise are seemingly being introduced in the space between legal absolutists on both sides, but whether these soft formulations (such as "take note of") that hardly have the ring of legal certainty to them will survive the drafting of legally binding texts is open to question.

### Financial settlement

Here the UK has agreed to the EU's terms. After Mrs May had initially accepted to pay around €20 billion, which was rejected by the EU as insufficient, she has now agreed to roughly double that sum. The numbers do not appear in the joint report, but they can be deduced from the key phrase that the UK will contribute until 2020 "as if it had remained in the Union". Such figures have also been quoted by British spokespersons. There remain considerable details to be tidied up, with ongoing further obligations that may materialise beyond 2020.

There were expectations that this vital money question would be subject to long and bitter disagreements and negotiating brinksmanship. Various speeches on the British side, including from some key ministers such as Boris Johnson, advocated taking a much tougher line. The EU's "extortionate demands" should be rejected, and the UK should have its fall-back position of 'no deal' firmly in mind. That this did not happen reflects two things. First is the phased structure of the negotiation process as between Phase I and Phase II, which the EU insisted upon from the start, and the UK had to accept. The UK government is desperate to get Phase II started, and it has come at a price. Secondly, the demerits of the 'no deal' option have become more widely understood, so its value as negotiating gambit has crumbled.

Overall, this agreed outline of the financial settlement is indeed a breakthrough for the process.

## Northern Ireland

Mrs May caught herself between the metaphorical rock and a hard place trying to leave the customs union. On the one hand, Ireland insists on no hard border and has a veto card in Brussels to enforce this, while on the other hand the Ulster Unionist party (DUP) rejects any special customs regime just for the Irish border and has the power to bring down the minority Tory government.

Undeniably, this is mission impossible. How then did Mrs May get an agreement?

The Joint Report reads: “The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border ... The United Kingdom’s intention is to achieve these objectives through the overall EU-UK relationship.” The first sentence satisfies the Irish Prime Minister, and the second one the DUP. This sounds like a Houdini escape. But where is the customs union in this? Does it mean that the British government intends to stay in the customs union? If so this is a very obscure way of announcing such a huge reversal in its Brexit policy.

The text goes on to indicate the default solution: “In the absence of agreed solutions the United Kingdom will maintain full alignment with those rules of the Internal Market and Customs Union which, now or in the future, support North-South cooperation, the all-Ireland economy and the protection of the 1998 Agreement.”

It further adds that “... the United Kingdom will ensure no new regulatory barriers between Northern Ireland and the rest of the United Kingdom”, unless Northern Ireland agrees.

It seems that agreement on the text was possible because its formulations are incomplete, and permit different contradictory interpretations that may be agreeable to the respective parties.

In particular, what are “... those rules of the Internal Market and Customs Union...”? The reader can have no idea. It sounds like some but not all the rules, but who knows which ones? The answer could still be all the rules, but if it does mean all the rules, this becomes a 180-degree U-turn in the UK’s Brexit policy, i.e. remaining in the Internal Market plus the Customs Union (Norway+Turkey). It beggars belief that such a change could be slipped into the text in such a non-transparent fashion. Or does it mean that only a selection of the rules would be applied? In which case, which are those rules that would be sufficient to avoid a hard border?

The text adds a further potential escape route: “the United Kingdom will ensure no new regulatory barriers” ... unless Northern Ireland agrees. Again the reader can have no idea what this might consist of.

We should remember that the EU side has also signed this Joint Report. Can the Commission say what this deplorably imprecise and confusing text means? We have become accustomed to the UK Brexit spokespersons speaking with ambiguity and imprecision. But M. Barnier and his colleagues have generally been more straightforward and clear.

Only one thing can be crystal clear. If the UK decided in the end to stay in the customs union, then the whole Northern Irish border problem goes away. But that seems to be much too simple.

### Overall

Two chapters now see substantial agreement. On citizens' rights, the obvious, sensible solution is agreed. On money, the UK has made a big concession, and so a big road block is removed.

On Northern Ireland, the search for a substantial agreement has been pushed forward into Phase II, with an element of procedural compromise by the EU side. However, the new framing of the Northern Irish border issue could also re-open on the British side the principal questions of the customs union and even the internal market for the UK as a whole. Who knows? But for the time being, there is only a Joint Report that is riddled with contradictions and inadequate formulations.