

JOINT REPORT ON PHASE 1 OF ARTICLE 50 NEGOTIATIONS

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1. Legal Status of the Joint Report

Question

Para 5: “Nothing is agreed until everything is agreed”

Is the text from phase one binding? How can the land border be protected in a no-deal scenario if the agreement in this text is contingent

The Joint report is not a legally binding agreement. It is a preliminary agreement that sets a framework and goals for negotiations in the second phase.

With respect to a no-deal scenario, Paragraph 46 of the Joint Statements provides that the commitments made by the parties must be upheld in all circumstances, irrespective of the nature of any future agreement between the European Union and United Kingdom. This suggests that commitments such as those made in paragraph 49 (to maintain full alignment with those rules of the Internal Market and the Customs Union) are unqualified unilateral undertakings by the United Kingdom. Unilateral undertakings can be considered as legally binding under international law even if in this case it is difficult to see how they could be legally enforced in practice once the UK leaves the EU.

2. Trade in Goods and Border Controls

The Joint report proposes three possible scenarios with respect to North/South trade:

2.1 *Scenario One*

The first scenario is one where the EU and UK are able to negotiate an agreement that avoids a hard border. In order to do this any agreement would have to:

- (i) Maintain EU tariffs and rules on agricultural and industrial goods. This could be achieved either by signing a customs union agreement with the EU or signing a free trade agreement which requires the EU to replicate the EU’s tariff schedules.

- (ii) Replicate EU anti-dumping duties to ensure that goods subject to EU anti-dumping duties do not enter the internal market via the United Kingdom.
- (iii) Replicate all internal market rules on agricultural and industrial goods. To monitor compliance we assume that an institutional mechanism would have to be established.

There are a number of examples of non-EU countries that are closely aligned the rules of the internal market. Examples include the European Economic Area and the EU-Turkey Customs union. However, neither goes far enough in terms of “alignment” to avoid the need for border checks. The EEA requires full compliance with most internal market rules but are outside of the EU customs union meaning that border controls are still required to ensure compliance with rules of origin. Despite being in a customs agreement with the EU, border checks are also required for EU-Turkey trade because Turkey does not replicate EU anti-dumping duties and internal market rules on agricultural goods.

A more useful example would be the Crown Dependencies which are part of the EU customs union and follow EU internal markets on goods. As a result, export of goods from the Crown Dependencies to the EU, and from the EU to the Crown Dependencies, are treated as intra-EU trade and not subject to border checks.

2.2 *Scenario two*

(a) Potential NI-specific solutions

The second scenario is one where the United Kingdom proposes specific solutions that obviate the need for a hard border. The Joint report provides little detail as to what such solutions might look like. There are two main possibilities

- Specific solutions might allude to the idea that a technological solution can be found to the North/South border question. The idea has been widely discredited by customs experts.
- A specific Northern Ireland solution could also relate to the possibility of NI to either: (i) remain within the single market and the customs union; or (ii) become an independent customs union.

(b) NI remains in single market and CU

If NI was to remain in the EU single market and the customs union there would be no border controls with respect to North-South trade. This solution would require further devolution of powers to NI and a hard border would have to put in place with respect to NI/GB trade.

To soften customs controls on East-West trade, GB would have to recognise the equivalence of standards adopted by NI (even if they diverge from GB) and would apply no duties/tax on goods from NI. Some border checks would have to be maintained by GB on goods originating from NI in order to comply with UK rules of origin. Secondly, the EU would have to conduct checks on goods originating from GB into Northern Ireland in order to verify compliance with standards, tariffs, internal taxes (e.g., VAT) and rules of origin. In other words, the only way this scenario can lead to the avoidance of a hard border between North-South is if border checks are put in place between NI and GB. Thirdly, some form of institutional mechanism would have to be put in place to oversee to ensure GB/NI compliance with EU standards and CU rules. The [Commission Communication](#) on the state of progress of Article 50 negotiations acknowledges this by specifying that “implementation and oversight mechanisms for the specific arrangements to be found will be established to safeguard the integrity of the internal market”.

Although this scenario would be politically problematic from a UK perspective, it should be noted that paragraph 50 emphasises the need to ensure, “in all circumstances”, that the UK continues to offer the same unfettered access for Northern Ireland’s business to the whole of the UK internal market. Crucially, a similar emphasis is not placed on the need to ensure that UK businesses have the same unfettered access to NI. This suggests that both the UK and the EU remain open to the possibility of border checks between NI/GB. If the UK recognises the equivalence of relevant NI standards and decides to apply no tariffs on goods originating from NI, those border checks could be kept to a minimum.

(c) NI as a separate customs territory

The ramifications of NI becoming an independent customs territory were explored in our memorandum which was sent on 13 December 2017. This solution would not remove the need for border checks to all North-South and East-West. It would also require further devolution of powers to NI.

2.3 *Scenario 3*

The third scenario is one of last resort. In this scenario, the UK will not agree to a Customs Union agreement with the EU, while at the same time it will have to avoid a hard border in Ireland. The no-deal scenario requires the UK to unilaterally align NI regulations and customs, with EU internal market and customs union rules in order to guarantee the avoidance of a hard border with the South. The issue here is what “regulatory alignment” means in practice. No definition has been provided in the Joint Report. The term has been used in the context of EU Accession Agreements (i.e., agreements between EU and potential EU Member States) and refers to the

process whereby prospective new EU Member States progressively aligned their domestic rules with those of the single market. However, this definition does not seem particularly apt given that EU-UK relations are based on the opposite dynamic – that is, one where the UK wishes to gain the flexibility to progressively diverge from EU rules

Question

Para 49: “will maintain full alignment with those rules of the Internal Market and the Customs Union”

How can UK maintain full alignment without being members? There are no precedents for this.

There is no precedent for a country to secure unfettered access to the EU purely by unilaterally complying/aligning with EU rules. Moreover, there is no example of a country that has agreed to establish a separate customs system for one of its regions, although it could be legally possible (albeit quite complicated).

Summary:

Scenario 1 is the only option that could potentially remove the possibility of a hard border for North-South and East-West trade. It would require the UK as a whole to be part of a customs union with the EU and comply with internal market rules in goods.

Scenario 2 has been framed in vague terms and is therefore difficult to assess. Two realistic solutions that are specific to NI would be to either (i) keep NI within the single market and customs union or to (ii) transform NI into an independent customs territory. The first solution maintains the status quo with respect to the North-South border but would require East-West border checks. The second solution, depending on how it is implemented, would require East-West border checks

Scenario 3 would not remove the need for a hard border.

3. Free Movement of Persons

Question

Ireland will maintain EU freedom of movement. No hard border, or associated checks/controls at NI/RoI border, and commitment for no E-W barriers, would equal back door access for EU movement into GB. How does this square with controlling borders/immigration?

Unless the UK institutes passport controls between NI and GB, backdoor access from EU to GB is inevitable.

4. Citizenship

Question

Does an EU citizen have the right to bring a case to ECJ (including where they live?)

All EU citizens retain the right to bring a case to the ECJ against a member state. However, since the UK will leave the EU, their right to bring a case against the UK for a breach of EU law will end 8 years after the formal withdrawal date. Based on the Joint Report and the [European Commission's Q&A on rights of EU citizens post-Brexit](#), disputes against the UK would relate to violations of the following rights:

- Right to non-discrimination on the grounds of nationality (Article 18 TFEU)
- Right to move and reside freely within the EU (Article 21 TFEU)
- Rights derived from free movement of workers (Article 45 TFEU)
- Rights derived from the freedom of establishment (Article 49 TFEU)
- Rights derived from the Citizens Rights Directive (2004/38/EC)
- Rights derived from the EU regulation on the free movement of workers (Regulation 492/2011)

After the date of withdrawal, all disputes relating to EU citizenship rights will be brought before domestic courts. Domestic courts have an obligation to have “due regard” to relevant decisions of the Court of Justice of the EU in order to ensure consistency between U and EU case law on citizenship. If there is some doubt on the part of UK courts concerning the meaning of EU law on citizenship, UK courts can

refer a question of interpretation to the CJEU. This mechanism will end 8 years after the date of the withdrawal agreement.

Question

What about the ability to elect members of the European Parliament?

The right to participate in European Parliament elections is typically understood to be an EU citizenship right. As long as a NI citizens retain the right to hold an Irish passport, then their EU citizenship rights (including the possibility to vote for the European Parliament) will remain unaffected. We understand that the right for NI citizens to apply and obtain an Irish passport is subject to a Treaty between the UK and the Republic of Ireland that should not be affected by Brexit. Hence, as long as NI citizens hold an Irish Passport (or any other EU passport, for that matter) in addition to its UK passport, he/she will be able to vote and be elected at the EU parliament.

Question

Are there duties as well as rights of EU citizenship? (more in terms of whether this could be applied to goods)

No. The rights derived from EU citizenship are outlined above.