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Uneven Progress In The Brexit Progress Report

2 months ago
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A British Perspective

Last Monday's Progress Agreement has been applauded by most people, including prominent Brexiters, as a classic application of ambiguity to moving past the Brussels roadblock. As proof of the ambiguity, even the Dublin, normally united on EU matters, is divided between those who see the outcome as an Irish negotiating triumph and those who see it as no such thing. As it often does, ambiguity may cause trouble in future. Problems could erupt quickly if the EU seek clarification on the claims by senior pro-Brexit ministers that a future Tory government could ditch key aspects of the Agreement, although the British could draw attention to similarly provocative language from Irish ministers. For most, though, there is huge relief that the talks have moved on.

Once the money was agreed the EU showed every sign of wanting to move on. Firm EU backing appeared to be given to the Irish, but Brussels' hope was that the British would offer enough on the Irish border to move on quickly. For the UK, the cash concession is perhaps the least worrying. There was little doubt that the UK would honour its commitments of around £20 billion for the current EU spending round up to 2020. Much of the rest is support for long-term investment projects agreed in the current spending round but taking years to materialise, plus pensions for UK employees of the EU, and payments to EU institutions with which UK would wish to remain connected. Since the UK's *annual* net payments as an EU member are currently £10 billion, the Agreement on payments merely delays the start of the period free of such

contributions. Patience in this instance is a great virtue.

Nor does the question of citizen's rights raise any fundamental issues. It was always likely that citizen's rights would be fully protected in both the UK and EU, and the document contains few surprises. The potentially contentious issue of the jurisdiction of the European Court of Justice in these matters has been resolved largely in favour of the UK, as expected. A time-limited ongoing role for the ECJ on citizen's rights seems reasonable. One potential time-bomb concerns Northern Ireland where almost everyone, but particularly the nationalist community will be treated as permanent EU citizens, with unpredictable consequences.

It is on the fraught issues of the Irish border and regulation that ambiguity flowers most exuberantly and the potential difficulties begin to multiply. It is important to note that the DUP did not agree the revised wording of the final document they had earlier decisively rejected. Instead they bowed to Theresa May's need to meet a timetable imposed by the EU. They certainly got some clarificatory words, but the Irish also took the opportunity to harden their position on some aspects of the paper. The result is a stand-off, with all to be resolved later. UK Brexiters, including the DUP must hope that an eventual EU:UK free trade agreement on goods, including measures on regulatory equivalence, will allow them to avoid a hard border without much damage to freedom of action in either Northern Ireland or GB.

In fact, the UK offers a triple lock to honour its guarantee of no hard border, given here in writing as the Irish demanded. The first lock is a Free Trade Agreement. If this is not realised, then the UK will propose specific solutions for the island of Ireland. These would require the agreement of the Irish. Since the UK Government already proposed a range of such 'solutions' in its position paper of last August, only to have these summarily dismissed by the EU and Ireland, it is not obvious what these might be. The third lock is *'in the absence of agreed solutions, the UK will maintain full alignment with those rules of the Internal Market or Customs Union which, now or in the future, support North-South co-operation, the all-island economy and the protection of the 1998 agreement'*. The mention of the all island economy in paragraph 49 of the Agreement (the number will become well known) implies that this statement applies to all trade between Northern Ireland and the Republic of Ireland, and not just to transport, agriculture and energy as in the earlier draft. However, Irish sources confirm that alignment refers to the areas of co-operation in the Good Friday Agreement, although these cover a wide swathe of the economy. The word 'full' in reference to regulatory alignment, appears to have been inserted in the revised version of the Agreement. On the other hand, the

references to the Good Friday Agreement give Northern Ireland a reasonable handle on restraining Dublin's ambitions. Patrick Smyth, the experienced Irish Times European editor writes simply that the unionists have a veto. Quite simply it is not possible to protect the GFA by over-riding the unionist position which lies at the heart of it.

The first two locks appear to be in the gift of the EU and Ireland. Hence the UK could be forced to use the third lock, of maintaining full regulatory alignment for the UK as a whole, albeit in reference to Irish cross-border activities. The UK does not need such alignment in order to export to the EU as long as individual firms meet EU standards in their sales into Europe. Alignment does make it easier for EU firms to export into the UK, and in this sense, is more important for the EU than for the UK. Some Irish border alignment could be managed with or without an FTA or UK-wide regulatory alignment. Northern Ireland's food producers need to meet EU regulatory standards to export into the EU, and currently do so. They would no doubt plan to continue to meet these in future. The problem arises with firms in GB that could use an open north-south border in Ireland to route non-compliant goods through Northern Ireland and into the EU. As far as live animals and fresh meat are concerned checks at NI ports might be unexceptional, despite DUP wishes to avoid a border between NI and GB. The problem comes for everything else.

The EU could hardly tolerate such an obvious loophole in its commercial border defences, and pressure would come on Northern Ireland to agree the necessary checks at its border with GB if regulatory alignment is not UK-wide. The revised paper says in paragraph 50 that border controls between NI and GB must be agreed by the NI Assembly and Executive (which currently do not exist). This gives the DUP an important measure of control, but the EU may use sanctions to enforce compliance. The DUP did gain some protection from the addition of the statement that the UK '*will continue to ensure the same unfettered access for Northern Ireland businesses to the whole of the UK internal market*', but this creates a potential breach in the UK's customs defences if there are no controls at the border between Northern Ireland and the Republic. Again both a free trade agreement and UK-wide regulatory alignment would be needed to avoid this.

The possibility of achieving a free trade agreement is a calculated risk for the UK. Without an FTA, and hence tariff-free trade in goods across Northern Ireland and other UK borders, a frictionless frontier can only be achieved with co-operation from Ireland and the EU. Without co-operation on such things as electronic customs clearing and automatic number plate recognition, both Ireland and the EU might insist on *full* unilateral regulatory alignment in

Northern Ireland on the grounds that this is what the December 8th Agreement promises. This in turn appears to mean *full* unilateral regulatory alignment for the UK as whole. This outcome would mean that that the UK is locked into equivalence with EU regulations just to meet Irish demands for an open border that could have been achieved by the means described in the UK position paper last August.

It may be less important that the document concedes a (tenuous) link between peace and the maintenance of the Good the Friday Agreement, including ‘subsequent implementation agreements and arrangements’. Like the ‘necessary nonsense’ (an NIO term, originating earlier with Brian Faulkner) inserted into the Good Friday Agreement, this may not mean much, but here it is on paper to be wheeled out whenever needed in future. The wording is odd, with the UK ‘recalling’ commitments rather than providing commitments in this agreement. These links play an important role in the Irish rationale for a borderless island, and their inclusion in the document marks a step towards realisation of the Irish goal.

Until Leo Varadkar became Taoiseach last June, the Irish Government appeared to go along with the British interpretation of the border issue as a practical matter of minimising disruption to personal and commercial cross-border movements. Varadkar swept this away, making the issue one of Irish identity, and the DUP have responded by defending their British identity. Any semblance of a border emphasises the Britishness of Northern Ireland and became unacceptable to the Irish. Meeting an emotional issue of identity rather than practical needs of cross-border travel, ratcheted the problem up several notches, and the failure of the UK Government or the DUP to counter the identity argument earlier, meant that negotiators were unprepared and have had to fall back on a troublesome ambiguity.

All in all, the Progress Document is something of a canine’s breakfast with the Irish border tail wagging the UK dog. The Irish Government seem satisfied that they received the border guarantees they wanted, but it is not at all obvious that this is correct. The DUP may be entering the post-Brexit world on the back foot but are re-assured that they are protected by the revised wording of the Agreement. The Irish have expended huge political capital on what, in reality, is a secondary issue. Could it have been better from a UK point of view? Probably not, once the end game was reached, but Irish preparation was stronger between June and December and the British have paid a price for taking their eye off the ball. That price was the ambiguous language, and a week for Theresa May which to say the least was one of her most difficult.

For the future, the British will now proceed to try to negotiate a Canadian style FTA. The Canadian CETA excluded financial services and aspects of agricultural regulation, and hence Theresa May talks about 'Canada-Plus'. One approach might be for the UK to propose to leave agriculture out of the FTA. Food exports are much more important for the EU27 than for the UK and can be used as a bargaining chip. The Irish can hardly object to the UK giving full primacy to its own national interests at the cost of causing pain for Irish food exports. The trade-off will come over financial services. The most likely outcome will be free trade in goods, and some partial agreement on financial services with things like Euro-currency clearing confined to Eurozone banks. Much has been made of the importance of financial services to the UK economy, but financial exports (including insurance) to the EU comprise only 5% of UK exports of goods and services. The loss of some financial service exports to the EU is unlikely to devastate the UK economy. The UK thus has room to play hardball, including in negotiating regulatory alignment.

Irish perspective

The outcome of the first phase of the Brexit discussions has been welcomed across the political spectrum in Ireland, though with various degrees of enthusiasm. The primary goals of ensuring no hard border; the preservation of the Common Travel Area (CTA); the continued commitment to the Good Friday (Belfast) Agreement; and move onto phase 2 and trade issues, were all achieved. In fact, the text (para 49) which emerged on Friday was, in some respects, more comprehensive on the border assurances than the early one, rejected by the DUP.

However, doubts have been raised in Ireland by the addition of the new paragraph 50 which was inserted into the agreement at the insistence of the DUP. On the face of it, this could mean that the UK has essentially given up its ability to deviate significantly from EU policy and practises, or it simply could be in direct contradiction of the assurances in para 49. It has all the hallmarks of a fudge and the postponing of a resolution of the thorny border issue until later in the negotiations when the future trading relationship between the UK and the EU becomes clear.

There is also the realisation in Dublin that the outcome of the Brexit negotiations will have to be passed by the British Parliament and, until the next election, the DUP will continue to have a pivotal role. There is some thinking in Dublin that the final trade deal will take up to 5 years and this Parliament will have come and gone and with it, the DUP's hold over the Prime Minister. In any

event, the relationship between the Taoiseach Leo Varadkar, and his Deputy Simon Coveney, with the leaders of Unionism in Northern Ireland appears to have been damaged by the recent controversy and will require attention for the new regime in Dublin. The leader of the DUP, Arlene Foster, has already indicated that she would have liked more changes in the text but ran out of time. She agreed to support the Prime Minister in the overall national interest but fully intends to return to the issue.

There is also another question mark hanging over Dublin in the aftermath of the first phase of negotiations. The EU has stood very firmly with Ireland and there may be an expectation of a pay back to Brussels in the form of Irish support for the more Federalist ideas of Juncker and Macron. To date, Ireland has been among the strongest resisters of further consolidation of power in Brussels in areas like taxation, Eurozone Finance Minister etc. The likelihood of the SPD and in particular Martin Shultz, becoming part of the new Government in Berlin, only adds to these fears.

There is still a long way to go in the Brexit saga.

This article first appeared on the Policy Exchange website on December 10th 2017 at:

<https://policyexchange.org.uk/uneven-progress-in-the-brexite-progress-report/>