

Article 50 negotiations – Briefing by Cytûn’s Policy Officer

The European Council meeting on December 14-15 agreed that the Article 50 negotiations on the UK’s withdrawal from the European Union have made sufficient progress to allow the second phase to begin¹.

The agreements reached so far are outlined in the Joint Report issued on December 8². This document is in some respects ambiguous, and has been subject to a variety of interpretations by politicians and commentators in the UK. Fortunately, the European Commission has issued a Communication³, also dated December 8, written in less opaque language, indicating its understanding of what has been agreed. Although the Joint Report states that *nothing is agreed until everything is agreed* (para 5), which leaves some room for doubt, it seems likely that this first agreement will form part of the eventual Withdrawal Agreement.

The initial agreement covers three principal issues. One of these (the financial settlement) is an issue on which Cytûn and its members have not commented, and so this briefing does not comment on it either. The other two, however, are issues which we have discussed and about which we have expressed views in our responses to UK Parliament and Government, the Welsh Government and the national Assembly for Wales.

1. The rights of EU citizens in the UK and UK citizens in the EU.

This is an issue which has been of considerable concern to churches since the referendum, not least because of the number of EU citizens in membership of Cytûn affiliated churches. The European Commission helpfully sets out the principal rights which will be guaranteed:

The common understanding reflected in the Joint Report means that both Union citizens and United Kingdom nationals, as well as their respective family members can continue to live, work or study as they currently do under the same conditions as under Union law, benefiting from the full application of the prohibition of any discrimination on grounds of nationality. The only restrictions which apply are those derived from Union law.

Those who have not yet acquired permanent residence rights – if they have not lived in the host State for at least five years – will be fully protected by the Withdrawal Agreement, and be able to acquire permanent residence rights also after the United Kingdom’s withdrawal.

It has also been agreed that the Withdrawal Agreement will protect the current rights of spouses, registered partners, parents, grandparents, children, grandchildren and a person in a durable relationship, who do not yet live in the same State as the Union citizen or the United Kingdom national, to join them in the future.

In the Commissions view, the reunification right referred to in the previous paragraph shall also cover future partners or spouses of Union citizens and United Kingdom nationals, who are not yet partners or spouses at the ‘specified date’, as defined above. This important matter should be dealt with in the second phase of the negotiations and will inevitably be linked to the level of ambition of the future partnership between the EU and the United Kingdom.

¹ <http://www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf>

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/665869/Joint_report_on_progress_during_phase_1_of_negotiations_under_Article_50_TEU_on_the_United_Kingdom_s_orderly_withdrawal_from_the_European_Union.pdf (referred to as JR)

³ https://ec.europa.eu/commission/sites/beta-political/files/1_en_act_communication.pdf (referred to as EC)

According to the understanding, all children will be protected by the Withdrawal Agreement, wherever they are born before or after the United Kingdom's withdrawal, or whether they are born inside or outside the State where the responsible Union citizen or the United Kingdom national resides. The only exception foreseen concerns children born after the United Kingdom's withdrawal and for which the parent not covered by the Withdrawal Agreement has sole custody under the applicable family law. (EC pp 5-6).

EU citizens can continue to acquire these rights in the UK, and UK citizens in the EU, until the UK's withdrawal on 29 March 2019. If a transition period is agreed, then they will be able to acquire these rights until the end of the transition period (likely to be around 31 December 2020). The agreement also states that the procedure for registering such rights shall be simple and the Commission wishes it to be free of charge.

One of the implications of this is that the UK will have to accept the continued supremacy of EU law over UK law in this respect for the lifetime of those covered by the agreement – well over 100 years - unless a future UK Parliament repeals the relevant legislation (JR para 36). It is not clear what legal recourse, if any, EU citizens in the UK might have if repeal were to occur. The European Court of Justice will have a direct role in assisting UK courts to enforce these rights for the first eight years they are in force – long enough to allow any EU citizen who enters the UK on the last possible day to have acquired the rights through five years' residence and to have brought any legal action regarding their application for such rights. After this eight years, UK courts will have discretion whether or not to take ECJ rulings on citizens' rights into account in reaching their decisions.

The rights of UK citizens in the EU will be exercisable only in the member state where they are resident at the 'specified date' (either withdrawal day or the end of the transition period), rather than throughout the EU as many had hoped. However, their rights *will be binding upon the institutions of the Union and on its Member States from its entry into force* (JR, para 36) and there is no provision for future repeal. The ECJ would have permanent judicial oversight of these arrangements throughout the remaining EU.

2. The border between Northern Ireland and the Republic of Ireland⁴

This part of the agreement is less concrete than the first, with important issues postponed until the next phase of negotiations. As the European Commission remarks:

Whilst the United Kingdom remains committed to protecting and supporting continued NorthSouth cooperation across the full range of contexts and frameworks, including after withdrawal, the common understanding provides that the United Kingdom aims to achieve this protection and the avoidance of a hard border through the overall EU-United Kingdom relationship. This intention seems hard to reconcile with the United Kingdom's communicated decision to leave the internal market and the Customs Union. (EC, p. 9).

Nonetheless, the Joint Report makes some significant commitments in this regard, applicable to Wales and the rest of the UK as well as Northern Ireland:

- Should the overall EU-UK agreement not allow a soft border between the two parts of Ireland, bespoke arrangements will be negotiated. This is likely to be difficult given the DUP's insistence that Northern Ireland should not have its own arrangements

⁴ I am very grateful to Dr Nicola Brady, General Secretary of the Irish Council of Churches, for her comments on this section. The section as published is my responsibility.

separate from the rest of the UK, and given that JR para 50 says that any divergence between Northern Ireland and the rest of the UK must be agreed by the Northern Ireland Executive and Assembly, which are not currently operational.

- *In the absence of agreed solutions, 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 allisland economy and the protection of the 1998 Agreement (JR, para 49).* This means that the default position in the event of ‘no deal’ between the UK and the EU will be continued alignment between UK and EU regulatory regimes, at least with regard to sectors affecting the Irish border. The Annex to Strand Two of the 1998 Good Friday agreement⁵ lists these as:

1. Agriculture - animal and plant health. [In practice, all agri-food matters are cross-border matters]

2. Education - teacher qualifications and exchanges.

3. Transport - strategic transport planning.

4. Environment - environmental protection, pollution, water quality, and waste management.

5. Waterways - inland waterways.

6. Social Security/Social Welfare - entitlements of cross-border workers and fraud control.

7. Tourism - promotion, marketing, research, and product development.

8. Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors. [The European Commission is proposing that at least the PEACE and INTERREG programmes should continue after Brexit – EC p. 9].

9. Inland Fisheries.

10. Aquaculture and marine matters

11. Health: accident and emergency services and other related cross-border issues.

12. Urban and rural development.

The all-Ireland energy market and other developments since 1998 mean this list will now be longer.

The effect of this is that in all these fields a so-called ‘soft’ Brexit (i.e. a commitment to maintaining EU standards and regulations) is the default option should no deal be struck, rather than a ‘hard’ Brexit. The burden of proof will now be on those who wish to see divergence between the UK and EU to show that this will not affect the Irish border.

This may also affect the political and parliamentary tactics of MPs and the devolved administrations in Wales and Scotland, who support a ‘soft’ Brexit, as a ‘no deal’ result may now be more in their interests than those of those who support a ‘hard’ Brexit.

- *The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms*

⁵ http://www.wesleyjohnston.com/users/ireland/today/good_friday/full_text.html

of discrimination enshrined in EU law. The United Kingdom commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards. (JR para 53). This appears to commit the UK to retaining substantial areas of EU law (including, presumably, the EU Charter of Fundamental Rights, which it has previously said it would not incorporate into UK law).

In addition, as Strand 3 para 2 of the Good Friday Agreement commits the UK to incorporate the whole of the European Convention on Human Rights into Northern Irish law, and as its agreement with the DUP prevents separate arrangements in Northern Ireland compared with the rest of the UK, this seems to entrench the Convention in UK law notwithstanding the Conservative Party's previous commitment to replace it with a 'British Bill of Rights and Responsibilities'. (However, the DUP has in the past been able and willing to support separate arrangements for Northern Ireland when they feel it is in their interests, e.g. with regard to devolution of Corporation Tax, so perhaps we should not place too much reliance on recent events in this respect).

- *The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.* (JR para 52). This raises some interesting questions as to the representation of EU citizens resident in Northern Ireland in the European Parliament and their right to take cases to the European Court of Justice. If the UK Government remains committed, in deference to the DUP, not to make separate arrangements for Northern Ireland, this would raise the same issues regarding the representation and legal rights of EU citizens in the rest of the UK.

A further implication of these commitments is that the restriction on any legislation contrary to "retained EU law" imposed on the devolved legislatures by Sections 10 and 11 of the European Union (Withdrawal) Bill currently before the UK Parliament now seems more necessary than it initially did. If the whole UK is committed by this part of the Withdrawal Agreement to substantial alignment with the EU with regard to trade regulations and human rights, it is difficult to see how this restriction can be lifted now, as the devolved administrations wish, as any changes to "retained EU law" could put the UK in breach of its obligations under the Withdrawal Agreement.

3. Other matters

The Joint Report refers to a number of other matters which have been the subjects of discussion, although not yet final agreement. Amongst these are:

- The UK will continue to contribute to the EU's refugee programmes and to the European Development Fund (relating to developing countries in the African, Caribbean and Pacific regions) until the end of 2020.
- Some agreement has been reached regarding the UK's withdrawal from Euratom (the European Atomic Energy Community, governed by a separate treaty). The UK

Government has promised a statement on Euratom withdrawal – which is opposed by many MPs – prior to Report Stage of the EU (Withdrawal) Bill in January 2018.

- *During ... a potential transitional period, the entire acquis – the full corpus of EU law – would continue to apply in the United Kingdom. Any such transitional arrangements would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.* (EC p. 15). This is not included so specifically in the Joint Report itself, but the agreement that the UK will pay in full into the EU budget until 31 December 2020 (JR, para 59) already implies such a result. If this transition period is agreed, it will give the UK and devolved governments until 31 December 2020 to prepare and agree the necessary legislative changes under the EU (Withdrawal) Bill and associated legislation. This is a more realistic timetable than seeking to complete the work by 29 March 2019, as is currently officially envisaged.
- Co-operation in policing and criminal matters, and many others, begun prior to withdrawal (or, by implication, prior to the end of a transition period), will continue after withdrawal. This emphasises that what is now proposed is, in effect, a gradual withdrawal from the EU rather than a clean break. While politically difficult for some, this will allow changes to the UK's legal and constitutional framework to be implemented gradually, which is surely more sensible in the long run.

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