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Brexit Breakthrough with Very Tough Choices Ahead

The publication on Friday morning (December 8) of the Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union¹ (the "Report") gave rise to headlines announcing a breakthrough in the Brexit negotiations. Ambiguity baked into the Report allowed both sides in the highly emotionally charged debate to claim victory. The reality is that significant challenges lie ahead.

Friday's agreement appears to have achieved a milestone set by the EU. The EU27 had laid down, as a precondition to moving to the negotiation of the future shape of the relationship between Britain and the EU, an agreement on three critical issues: protecting the rights of EU citizens in Britain and British citizens in the EU27 member states; the financial settlement between the UK and EU (or the so-called "divorce bill"); and the status of the border between the Republic of Ireland and Northern Ireland.

The last of these issues nearly caused the entire Brexit process to collapse following the intervention of the Democratic Unionist Party (DUP) in Northern Ireland, on which the Conservatives rely for their majority in Parliament. The DUP rebelled when it learned that the agreement contemplated Northern Ireland having separate regulatory status such that it – but not the rest of the UK – would remain in "regulatory alignment" with the EU following Brexit. The DUP intervention followed statements by the Irish prime minister that he was prepared to veto any deal that failed to properly address the Irish/Northern Ireland border question. As some commentators have noted, while in one sense a local issue, the hard border question really goes to the heart of Brexit as it impacts the entire country.

On Friday morning, a deal was sealed, though from many perspectives it has only postponed the ultimate day of reckoning. On the question of the Irish/Northern Ireland border, the Report provides – in paragraphs 49 and 50 – that:

The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will

¹ For the text of the Report, click [here](#).

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.

In the absence of agreed solutions, as set out in the previous paragraph, the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate for Northern Ireland. In all circumstances, the United Kingdom will continue to ensure the same unfettered access for Northern Ireland's businesses to the whole of the United Kingdom internal market.

Taken literally, this means that unless the UK can convince either the EU or the political powers in Northern Ireland to deviate from these principles, the UK as a whole will stay "aligned" with EU regulations to avoid the imposition of customs checks between the two countries. Avoiding a hard border as well as a sea border around Ireland implies a soft Brexit, but how that is to happen remains far from clear. In fact, how one keeps even a soft border while leaving the single market and the customs union remains equally far from clear.

As so many have warned, the hard part still lies ahead. The UK government faces major hurdles both within the Conservative Party, and in its upcoming negotiations with the EU.

The biggest challenge may be internal. While the deal reached Friday was taken by many in the press to suggest that Britain is headed for a soft Brexit, Brexiteers within the Conservative Party have gone to great lengths to note that "nothing is agreed until everything is agreed" and that the UK government retains the option to crash out of the EU and default to World Trade Organization rules. Those within the party that have enthusiastically promoted the benefits of Brexit – freedom from EU rulemaking, freedom from EU financial obligations, and the ability to stop freedom of movement of EU nationals into the UK, are increasingly dismayed to find that the terms of Brexit now contemplate continued "alignment" with EU rules (which, after Brexit, the UK will play no role in making), a steep divorce bill and perhaps significant continuing financial obligations, and the likelihood that large numbers of EU nationals will continue to be able to come to the UK, in part because they are badly needed by the UK economy. The Brexiteers may rebel.

One solution to the regulatory "alignment" issue would, of course, be to limit that alignment to Northern Ireland, which would in turn imply a *de facto* trade border across the Irish Sea. But that is exactly what has been vociferously rejected by the DUP. And the Conservative Party needs the votes of the DUP's MPs to remain in power.

The challenges in the next phase of negotiations with the EU are also daunting. The EU negotiators have set a deadline of October 2018 to reach agreement, in order to leave enough time for ratification of the future UK-EU relationship framework before the final deadline for the UK exit from the EU that is to take effect on March 29, 2019. Statements by EU officials suggest that the EU27 could be ready by February or March 2018 to engage seriously on talks over the future trade relationship between Britain and the EU, but only if a settled position emerges from Downing Street. There does not, however, appear to be any consensus within the UK government as to what it wants as an “end state” in the trade relationship, or more importantly, what it is willing to concede in order to get what it wants. In the absence of internal consensus, it may well be March before serious talks commence, leaving only a little over six months to hammer out a deal. Theresa May has said she wants a “Canada plus plus” trade deal. It took seven years to negotiate the trade agreement between Canada and the EU.

In the interim, discussions may focus largely on a transition period that is likely to last two years and during which Britain will remain subject to EU law and European Court of Justice jurisdiction, but without any formal input in the EU decision-making process. The Report does not address the transitional arrangements or their length, so much is open for discussion. Putting these arrangements in place will require legislation on both sides, in effect to stop the Article 50 clock. Far from an ideal solution, this may, however, be necessary to help Britain avoid the cliff edge of having no trading relationships with the rest of the world as of March 29, 2019.

Meanwhile, in the House of Commons, MPs are to vote soon on whether or not Parliament is to have a “meaningful” vote on the final terms of Brexit enshrined in the withdrawal agreement. The proposed amendment to the so-called Withdrawal Bill calls for a binding vote that would precede giving formal effect to Britain’s withdrawal. There is no certainty as to how this, or many other material amendments, will fare in Parliament, as the Cabinet’s usual ability to force MPs to vote in line with the government’s direction seems highly dubious in light of the complete lack of agreement within the Cabinet.

Indeed, no sooner had UK government ministers made the rounds of the Sunday talk shows, touting Friday’s breakthrough, when cracks began to appear in the supposedly united front. In particular, statements by David Davis that the pledges on the future of the Irish/Northern Ireland border were non-binding “statements of intent” prompted an immediate heated response from the Irish prime minister. A number of ministers took refuge behind the statement that “nothing is agreed until everything is agreed,” which the prime minister reiterated to the House of Commons on Monday. These statements collectively called into question just how solid and enduring were the agreements that appeared to have been reached in the Report.

Only time will tell.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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