

Brexit: The Compromise

Andrew Duff



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ABOUT THE AUTHOR



Andrew Duff is President of the Spinelli Group and a Visiting Fellow at the European Policy Centre. He was a member of the European Parliament 1999-2014. He tweets @AndrewDuffEU.

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On 15 January the House of Commons rejected the European Union's offer of an orderly Brexit by an astonishing 230 votes. While many British politicians and media have continued to talk glibly about the importance of "taking 'no deal' off the table", the defeat of the government's policy has plunged the UK and the EU into a deep crisis.

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It remains true, as Prime Minister May says, that the only way to prevent 'no deal' is to do a deal, and that the only deal on the table is that agreed between her and the European Council on 25 November.¹

As things stand, Brexit will happen without a deal on 29 March, and no unilateral British legislation can alter that date. Unless the UK revokes the Article 50 secession process entirely, finally and irrevocably, the EU will cut off the UK as a member state at midnight on that Friday. An extension of Article 50 is possible, but, as we discuss below, fraught with difficulty.

That the EU institutions refuse to reopen the legal text of the Withdrawal Agreement is an indication of how difficult it has been to negotiate with the UK in the first place. Ingenuity and generosity on behalf of the EU can hardly compensate for the shambolic nature of the UK's efforts to end its membership. For the EU the risk of collateral damage rises every day the deal is not ratified by the UK parliament.

IMPROVING THE POLITICAL DECLARATION

And yet. The EU is willing to show flexibility over the Political Declaration on the future relationship between the United Kingdom and the European Union.² This is the key document that will accompany the Withdrawal Agreement. It was published on 22 November and endorsed by the European Council and the British government.³

As the Political Declaration is open for modification, I have made a proposal of a new draft, the full text of which can be found at www.andrewduff.eu

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The proposed draft is informed by the conclusions of the European Council of 13 December, the exchange of letters between Prime Minister May and Presidents Tusk and Juncker of 14 January, the 'meaningful vote' in the House of Commons to reject the Withdrawal Agreement on 15 January, the subsequent vote (Brady amendment) of 29 January, which instructed the government to renegotiate the Irish backstop, the debate in the European Parliament on 30 January, the recent exchange of letters between Mr Corbyn and Mrs May, the joint statement of Mr Juncker and Mrs May after their Brussels meeting on 7 February, and, finally, the Commons debate on 12 February.

In amending the Declaration one must recall that its legal base is Article 50 TEU. The document exists only in the context of the UK's withdrawal from the Union. Its purpose is to accompany and elucidate the Withdrawal Agreement.

As far as the EU is concerned, the Declaration is the first draft of the Commission's mandate for the negotiation of the future association agreement, but it is not itself the legal mandate. The negotiation of the final deal can only begin after the UK has ceased to be a member state of the Union and will be conducted on a different legal base (Article 217 TFEU) and according to different procedures (Article 218 TFEU).

As far as the UK is concerned, the Declaration informs the Westminster parliament about the country's direction of travel post-Brexit. It indicates the location of Britain's final landing zone as an ex-member state. But it is only the start of the journey, not the arrival.

AN AWKWARD COMPROMISE

The Political Declaration has been criticised for many and contradictory things. It is accused of being at once too short and too long, too precise and too imprecise, too binding and too lax, too hostile and too accommodating.

The second version of the Declaration will have to demonstrate that it has been suitably adapted to take into account the refusal of the House of Commons to ratify the first.

The Declaration as published is self-evidently a somewhat awkward compromise between the established positions of the EU and the UK. It struggles to reflect not only the guidelines of the European Council but also the 'red lines' of Theresa May.

The second version of the Declaration will have to demonstrate that it has been suitably adapted to take

into account the refusal of the House of Commons to ratify the first. The Commission wants it to be more ambitious in terms of content and redrafted to deliver a speedier conclusion to the negotiation of the association agreement.

But the EU is also looking to create a deal that attracts broad bipartisan support in the Commons. A thin majority of Leavers in a second meaningful vote will not be enough to ensure the passage of all the legislation needed to properly implement the Withdrawal Agreement. Remainder votes are also required if the majority is to be, as Michel Barnier puts it, “clear and stable”.

FINDING MIDDLE GROUND

In the light of the Brady amendment, Mrs May continues to look for legally binding solutions on the Irish backstop that will persuade enough Brexiteers to change their mind and back the deal. She has three options, all of which have been tried before and rejected by the EU:

- ▶ to introduce a mechanism for the unilateral exit by the UK from the backstop;
- ▶ to install a specific time limit to terminate the backstop;
- ▶ to invent alternative arrangements that annul the need for the backstop.

It should not be so difficult to identify some centre ground on which the Labour leadership would be content for several of its MPs to rendezvous with like-minded Tories.

Whether or not she succeeds in this improbable endeavour, it is clear that as and when the prime minister makes concessions to placate the Brexiteers she will lose support for the deal among the much larger cohort of pro-European MPs.

There is a hard core of anti-European MPs who will never vote for any deal, amended or otherwise, preferring no deal. Likewise there is a small group of pro-European zealots in favour of a second referendum who seem prepared to risk no deal rather than accept any deal. Taken together, however, this unholy alliance of dividers numbers fewer than 100 MPs – leaving a very large number of MPs, including the usually opportunistic SNP, ready for reconciliation. Even the more intelligent members of the DUP will find it difficult to opt for no deal.

On the face of it, therefore, it should not be so difficult to identify some centre ground on which the Labour leadership would be content for several of its MPs to rendezvous with like-minded Tories.

MR CORBYN'S LETTER

Jeremy Corbyn's letter to the prime minister of 6 February has unusual importance.⁴ He drops his previous, rather silly demand, cribbed from a failed Brexit minister, that the UK must insist post-Brexit on enjoying exactly the same benefits as it does as a member state. In his late intervention to the Brexit debate, the leader of the opposition has five requirements:

1. A permanent and comprehensive UK-wide customs union, including alignment with the EU Customs Code, the common external tariff, “and an agreement on commercial policy that includes a UK say on future EU trade deals”.
2. Close alignment with the Single Market, underpinned by shared institutions and obligations.
3. Dynamic alignment on rights and protections, allowing the UK to keep pace with EU standards.
4. Clear commitments on participation in EU agencies and programmes.
5. Unambiguous agreements on the details of future security arrangements, including the European Arrest Warrant and shared databases.

In her emollient reply to the Labour leader of 10 February, Mrs May wrote:

“It is good to see that we agree that the UK should leave the European Union with a deal and that the urgent task at hand is to find a deal that honours our commitments to the people of Northern Ireland, can command support in Parliament and can be negotiated with the EU – not to seek an election or second referendum.”

Speaking to the House of Commons on 12 February, she confirmed her intention to seek improvements to the Political Declaration to which Mr Corbyn could lend his support:

“Because the Political Declaration cannot be legally binding and in some areas provides for a spectrum of outcomes – some Members are understandably concerned that they cannot be sure precisely what future relationship it would lead to. By following through on our commitments and giving Parliament that bigger say in the mandate for the next phase, we are determined to address those concerns.”

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The prime minister promises legislation to entrench a commitment to keep abreast with EU standards of

workers' rights, and environmental, health and safety protections.

By themselves, the proposals of neither Mrs May nor Mr Corbyn are sufficient to win a decent majority in the House. The two leaders have much in common. Both lead divided parties. Both want to respect the outcome of the referendum. Neither wants a second referendum nor, at least yet, a general election. There is broad scope for a pragmatic compromise between them, on the one hand, and between them and an EU desperate to reach a deal, on the other. There remain four issues to deal with: trade policy, the customs union, the movement of people, and the Irish backstop.

TRADE

It is a weakness in the government's strategy that it puts so much reliance on the wholly unproven success of its global "independent" trade policy. The fact is that few third countries are willing to favour a free trade pact with the UK over their free trade agreements with the EU bloc. Even rolling over the EU's multilateral trade treaties into bilateral treaties with the British is problematic.

The prime minister should drop from the Political Declaration language that simply reiterates earlier red lines.

"I am not clear", Mrs May retorted to Mr Corbyn, "why you believe it would be preferable to seek a say in future EU trade deals rather than the ability to strike our own deals?". The hard reality of international commercial negotiations will provide her with an answer.

The prime minister should drop from the Political Declaration language that simply reiterates earlier red lines. While it is perfectly sensible for the UK to adopt an ambitious trade policy, it serves little at this stage to stress that its trade must always be "independent" (paragraphs 4, 17). Some accommodation can surely be found through the revised Declaration to promise the UK more of "a say" in EU trade deals than is, for example, now afforded to Turkey, whose customs union agreement with the EU (1995) is asymmetric to the point of being unfair.

CUSTOMS

The degree to which the UK will cohere to the EU's common commercial policy and external tariff is dependent on the nature and closeness of the future customs arrangements. In her letter, Theresa May reminded Jeremy Corbyn that paragraph 23 of the Political Declaration "explicitly provides for the benefits of a customs union". She underlined in the House that she disagrees with the leader of the opposition that the UK should remain a member of the EU customs union.

"I would gently point out that the House of Commons has already voted against this. And in any case, membership of the Customs Union would be a less desirable outcome than that which is provided for in the Political Declaration. That would deliver no tariffs, fees, charges or quantitative restrictions across all sectors, and no checks on rules of origin."

The irony is that Mrs May claims that "one of our key negotiating objectives" is to secure "frictionless" trade with the EU in goods and agri-food products. She accepts a permanent customs union type agreement with the EU for goods while preserving autonomy for international trade deals in services.

Although in this digital age the practical distinction between trade in goods and trade in services is less clear than it once was, there is no reason why a customs union or free trade agreement cannot be limited to goods – as, indeed, the GATT and related WTO agreements are. Mrs May intends that the UK will be free to contract with third countries as it wishes on issues outside the customs agreement it strikes with the EU.

The Political Declaration already foresees the negotiation of a permanent customs union for goods, not least in order to avoid the return of a hard border in Ireland and to maintain industrial supply chains. The new customs arrangements, building on the single customs territory envisaged in the Irish backstop, will be tailored exactly to fit whatever is the negotiated outcome of the trade talks. It will be a customs union like no other: the UK will not be staying in the EU's existing customs union. The obvious outcome of an ambitious, comprehensive free trade agreement, which Mrs May wants, is a new customs union, which Mr Corbyn wants (paragraph 79).

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Mr Corbyn would be wise not to insist on the term "customs union". That "we are leaving the single market and the customs union" has become one of Mrs May's most repeated sound bites, making it difficult for her to retreat. Best to call it a "customs accord" (paragraph 26).

MOBILITY

Mrs May also challenges Mr Corbyn on the free movement of people. She wrote:

"The fundamental negotiating challenge here is the EU's position that completely frictionless

trade is only possible if the UK stays in the single market. This would mean accepting free movement, which Labour's 2017 General Election manifesto made clear you do not support."

It is indeed a liability in Labour's policy which it seems not to acknowledge that, according to the seminal Article 26(2) TFEU, the single market comprises an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured". At least Mr Corbyn appears to have dropped, by way of compromise, his previous objections to EU state-aids and competition policies.

A more open approach by the UK to arrangements that allow for the mobility of workers and their families, on a reciprocal basis, would do much to soften the Commission's negotiating position on services.

From an economic point of view, the big flaw in the Political Declaration is the lack of attention paid to the potential of free trade in services. This is a natural consequence of the British refusal to accept the free movement of those EU citizens who, for the most part, deliver services and establish firms.

It would therefore be helpful if the UK felt it no longer necessary to emphasise that it opposes freedom of movement (paragraph 4). A more open approach by the UK to arrangements that allow for the mobility of workers and their families, on a reciprocal basis, would do much to soften the Commission's negotiating position on services (paragraph 50).

POSITIVE REASSURANCE

Responding to criticisms of the Political Declaration that it is too conditional and tentative, the language can be made less weasely and more positive throughout. So "could" becomes "should", and "should" or "would" becomes "will" or "must". The tone of the document is transformed by such sub-editing. Frequent euphemistic mention of "final relationship" would be better rendered as "Association Agreement".

Additional paragraphs could usefully spell out the central objective of the new deep and special partnership, as follows:

5a. The aim of the economic partnership will be to promote trade and investment between the Parties and with third countries. The Association Agreement will include arrangements for a deep and comprehensive free trade area and a customs accord, taking into account a degree of regulatory alignment that will be determined in the

course of its negotiation. Given their high level of economic interdependence, the Parties agree to work together for the sustainable development of Europe, based on a competitive social market economy aiming at full employment and social progress. They are committed to combatting global warming.

5b. The aim of the security partnership will be to promote peace, freedom and justice. The Association Agreement will ensure the close cooperation of the Parties with a view to maintaining internal and external security for their citizens and states. It will provide for regular dialogue and possible joint action in the fight against crime and terrorism. It will enable the continuing development of close relations in foreign, security and defence policies, while respecting the constitutional autonomy of the Parties and their current and future obligations under international law.

To reassure the sceptics, reassurance can be given on constitutional matters. Brexit, after all, means Brexit:

4a. Cooperation between the Parties in the framework of the Association Agreement shall respect the constitutional, legal and political autonomy and identity of the United Kingdom and of the European Union and its Member States.

As Mr Corbyn suggests in his letter, with which Mrs May concurs, amendments can be made to the text that serve to strengthen the UK's continuing commitment to non-regression in terms of workers' rights and consumer and environmental standards, enhancing respect for the concept of the level playing field (paragraph 79, 79a).

Intentions with regard to political and operational cooperation in the fields of internal and external security can be enhanced. Reference to the EAW, ECRIS and SIS II should be made specific (paragraphs 87, 89).

To reassure the sceptics, reassurance can be given on constitutional matters. Brexit, after all, means Brexit.

Future participation in EU programmes and agencies can be fleshed out, alongside stronger UK commitment to a new, trustworthy regulatory framework of its own, independent of ministerial direction (paragraphs 24, 24a, 60, 61). Both parties should commit in principle to negotiating the readmission of the UK to the EIB (paragraph 15) and to the Galileo project (paragraph 107).

LEGAL STANDING

The prime minister is right to want to upgrade the soft law status of the Political Declaration. A new paragraph can be added to affirm that the Declaration is politically binding on both parties, committing them accordingly to give the Declaration appropriate legal recognition in their respective instruments of ratification (paragraph 1a).

A further helpful device would be a third document to act as a formal legal bridge between the Withdrawal Agreement and the Political Declaration. This measure would spell out how the Declaration is to be implemented in practice, using the transition period provided for by the Withdrawal Agreement to negotiate the final treaty. It would deploy the Joint Committee to assess any new customs arrangements designed to annul the need for the Irish backstop.

Such a legally binding implementing protocol would be annexed to the Withdrawal Agreement in the way that, for reasons we know, the Political Declaration itself cannot be (paragraphs 1b, 138).⁵

A further helpful device would be a third document to act as a formal legal bridge between the Withdrawal Agreement and the Political Declaration.

The revised Political Declaration could accentuate the joint nature of the envisaged governance of the association agreement, along with its democratic character (paragraphs 5c, 123a, 124a, 129). The implementation protocol should provide details of the role of the Joint Committee during the transition period and beyond. If the UK is to have Mr Corbyn's "say" in EU trade policy, it will be through the working of these joint institutions based on the template of the Ukraine Association Agreement of 2014.

THE IRISH BACKSTOP

Upgrading the legal and political importance of the Political Declaration caters effectively with the controversy over the Irish backstop (without having to reopen the Withdrawal Agreement). Extra paragraphs could justify the Irish backstop in terms less occluded than those found in the Withdrawal Agreement, making clear that the backstop has the dual purpose of protecting both the EU single market and the Good Friday Agreement. In the context of the future association agreement, the backstop will become redundant (paragraphs 5e, 5f, 19, 19b, 139).

Upgrading the legal and political importance of the Political Declaration caters effectively with the controversy over the Irish backstop.

The search for technological solutions to manage borderless customs, so beloved of Brexiteers, could be

made subject to a joint enquiry (and not left to the UK's lonely best endeavours) (paragraph 19a).

The only alternative to the backstop is for the UK to accept even closer alignment with the EU than that envisaged in the Political Declaration.

A clause should be added to the Declaration and the implementation protocol to recall that the association agreement can partially enter into force on a provisional basis, before all ratification procedures are complete, in particular to avoid unnecessary default to the backstop (paragraph 138a).

If a legally sound compromise along these lines is not agreed by the Commons, there will be no deal. The only alternative to the backstop is for the UK to accept even closer alignment with the EU than that envisaged in the Political Declaration. Neither Mrs May nor Mr Corbyn want that.

THE TICKING CLOCK

Theresa May says she has no intention of asking for an extension of Article 50. Those who voted to set the clock ticking two years ago, but have since rejected the Withdrawal Agreement, accuse her of "running down the clock".

If a compromise on the Political Declaration is not reached, and there is no UK ratification of the deal, the European Council is unlikely to agree to a panicky and purposeless short extension.

If a compromise on the Political Declaration is reached, the British parliament has to ratify the Withdrawal Agreement before 29 March. In that event, for reasons of domestic legislation, the UK will have to request a three-month extension of the Article 50 timetable. The European Council would be inclined to agree to this unanimously at its next scheduled meeting on 21-22 March.⁶ A short prolongation of the timetable to complete the orderly secession would allow the European Parliament time to vote its consent to the package before the last working day of its current term, which is 17 April. The Council could then smoothly complete the legal processes before 30 June.

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European Council is unlikely to agree to a panicky and purposeless short extension. And there will certainly be no agreement to permit the British a rolling extension.

Instead, the 27 leaders would have to consider whether to offer the UK a one-off longer extension of Article 50 in order to avoid no deal and give the Brits one last chance. But an extension into and beyond the autumn of 2019 would oblige the UK to continue to negotiate Brexit while at the same time holding elections to the European Parliament, appointing a new Commissioner and re-engaging in difficult budgetary discussions.

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A long extension would be sure to provoke a very strong reaction in British public opinion. The nationalist pot would be well stirred. The EU would be accused of trapping the UK inside the EU against its will. In such heated circumstances political consensus at Westminster would be much harder to reach even than it is today.

DIVISIVE POPULISM

A lengthy extension of Article 50 would excite calls among Remainers to hold a second referendum. That would be a bad mistake. Another plebiscite would escalate the crisis for those political parties that had recourse to it, further enfeebling Britain's once proud system of parliamentary government. Another referendum would leave the nation even more divided in terms of class, province and generation. If Scotland

and Northern Ireland again voted contrary to England, the dissolution of the United Kingdom might follow.

The Brexiteers are raring to go yellow-vested, armed with their slogan "Tell Them Again!"

A second In/Out referendum would bamboozle the financial markets and investors. It would destabilise the politics of the European Union. And all the polling evidence suggests that it would be unlikely to settle the question of Britain's European future in a stable and intelligent way.

The referendum campaign would be at best messy, at worst anarchy. Remainers are unable to agree among themselves about the question to be put in a second popular vote. Remainers and Leavers would quarrel about the referendum's rules of conduct.

Remainers would also struggle to vindicate their decision to overturn the 2016 referendum they once promoted and whose verdict they pledged to respect. By contrast, the Brexiteers are raring to go yellow-vested, armed with their slogan "Tell Them Again!"

European Council President Donald Tusk was right to conclude (6 February) that:

"The facts are unmistakable ... Today there is no political force and no effective leadership for Remain. I say this without satisfaction, but you can't argue with the facts".

The next more or less meaningful vote in the Commons is on 27 February. Good luck everybody.

¹ https://ec.europa.eu/commission/publications/agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en

² See my previous EPC paper, *Brexit: How the Political Declaration can rescue the Withdrawal Agreement*, 8 January 2019.

³ https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom_en

⁴ <https://labour.org.uk/press/jeremy-corbyn-lays-labours-five-brexit-demands-letter-theresa-may/>

⁵ A proposal for such an implementing protocol was presented by Kenneth Armstrong, Professor of European law in the University of Cambridge, at a seminar on 7 February at 39 Essex Chambers.

⁶ In these circumstances, the decision of the European Council under Article 50(3) to allow a short extension would include a derogation to permit the UK not to hold elections to the European Parliament on 23-26 May.

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