

# Brexit: Time to compromise

**Andrew Duff**

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*Locked gates at Stormont Castle, Belfast*

*Credits: AFP*

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## ABOUT THE AUTHOR



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## DISCLAIMER

The views expressed in this Discussion Paper are the sole responsibility of the author.

## STALEMATE

The Brexit talks have stalled. It will take a compromise on Ireland by Prime Minister May to restart the process. Despite appearances, she has proved herself capable of compromise.

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The European Union made it clear from the outset that if the British government were to modify its self-imposed 'red lines', it would return the compliment and soften its own approach to the terms and conditions of Brexit. Theresa May regularly declared that, for her government, the meaning of Brexit is to leave not only the EU institutions but also both the single market and the customs union.

Given her rejection of the four principles of freedom of movement, the EU did not cavil with the prime minister's decision to leave the single market and customs union. That is why EU negotiator Michel Barnier and his team spent months directing the British towards a Canada-type free trade deal and not a Norway-type association agreement based on full regulatory alignment.

Realising the economic damage that would be perpetrated by a Canadian deal, however, Mrs May shifted her ground on the customs union. A 'technical note' proposing the creation of a new customs territory comprising the UK and EU (now removed from the government's website) was sent to Brussels on 7 June.

At Chequers in early July the cabinet formally modified the red line on customs union and proposed amongst other things a common rulebook for goods and agri-products. Chequers constituted a shift away from free trade towards a regulatory paradigm in which the UK would guarantee to preserve as much regulatory alignment with the EU *acquis* as possible.<sup>1</sup> Albeit its first proposal for a complicated 'facilitated customs arrangement' was shot down by Mr Barnier on the grounds of insufficient respect for the EU's legal order. But the UK's basic change of tack on future customs cooperation was confirmed in the White Paper and subsequently reinforced by Olly Robbins, the British negotiator.<sup>2</sup>

## TEMPORARY CUSTOMS ARRANGEMENT

The British have made a fresh proposal for a 'temporary customs arrangement' involving continued adherence by the whole of the UK to the EU Customs Code and common external tariff for a limited time. The government argues, correctly, that leaving the EU's customs union would cause unreasonable disruption to the flow of trade and people across the Channel; it realises that it cannot deliver on its promise of no hard border with Ireland without such a customs agreement for Northern Ireland; it is loath to widen the gap across the Irish Sea between Great Britain and Northern Ireland; and it is prepared to accept both for the transition period and beyond joint UK-EU governance arrangements to manage matters equitably. Trade minister Liam Fox's global deals will have to wait a bit.

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The European Union, true to its own willingness to compromise, has now accepted that the UK as a whole, and not just Northern Ireland, can stay as an effective member of the customs union until a future comprehensive association agreement is negotiated and ratified. The temporary customs arrangement will have to be negotiated during the transition period as a staging post towards the final Association Agreement. However, two further issues arise from this critical concession.

The first complication is the temporary nature of the British proposal. In its short but stressful history, the EU has become fairly good at temporising, but there are legal as well as political impediments to allowing the British easy access to the EU's customs union as a legacy of membership without subjecting the UK to a full renegotiation of terms like any other third country. This is a matter of the Union's primary law: while a temporary customs arrangement can be permitted under Article 50 TEU in the *lex specialis* of the Withdrawal Agreement, any permanent association has to be negotiated on the legal basis of Article 207 and 217 TFEU and according to procedures laid down in Article 218.

The second question concerns the mechanism that is therefore required to terminate the temporary customs agreement. Common sense suggests that any decision to move from the temporary to a permanent new arrangement would be taken by mutual consent. Indeed, the Withdrawal Agreement sets up a system of joint

governance, headed by a Joint Committee, which could be empowered to take just such a decision. Here, however, the collapse of trust between the two sides to the Article 50 talks is a real and present obstacle to the completion of the negotiation. Brexiteering Tories, fearing that the EU is plotting to trap the UK into permanent vassalage, demand that the UK will be able to pull the plug unilaterally. The EU has well-recorded remarks by Michael Gove to the effect that the UK will be able to do what it wants once it has left the Union. Seen from Brussels, Perfidious Albion seems alive and well.

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## EXTENDING THE TRANSITION

In view of the pervading general mistrust, it is a relief that it has been agreed, at least in principle, that the transition period should be extendable beyond its initial deadline of 31 December 2020. While this decision also enrages fanatic Brexiteers, any British politician left with a jot of reason has listened to business interests for whom the threat of constant changes to the commercial regime is clearly damaging. And every precedent suggests that, no matter what the claims of Conservative ministers, the chances of wrapping up a whole new free trade agreement in the eighteen months after Brexit are nil.

The precise mechanism for taking the decision to extend the transition, which must include budgetary matters, has yet to be written into the draft Withdrawal Agreement. It would be sensible for the UK to ensure that the EU side would not have to decide this by unanimity: the risk of a veto among 27 national leaders is never absent. A good procedure would be for the request for an extension to come from the UK, for the Commission to make a formal proposal to that end, for the European Parliament to be asked to give its assent, and for the Council to act by qualified majority.<sup>3</sup>

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It would also be intelligent not to impose another artificial deadline to the transition period which would serve only to postpone but not eliminate the cliff

edge. The transition period will have to be well used to negotiate both the temporary customs arrangement and the final Association Agreement. If those negotiations are successful the transition period will end when the new arrangements enter into force; if unsuccessful, we will be back at the cliff edge of no deal.

## THE IRISH BACKSTOP

Both sides agree that Brexit must not lead to a return of a hard border across the island of Ireland. Such a thing would, it is agreed, provoke the para-militaries to renewed action against the constitutional settlement that was reached, after years of bloodshed, in 1998. The Good Friday Agreement is a treaty between the UK and the Irish governments conceived according to the letter and the spirit of their countries' joint membership of the European Union. The EU, as well as the USA, is a sponsor of the agreement and has contributed a very large amount of money to support the fragile peace process through social and economic development.<sup>4</sup>

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The essence of the Belfast treaty is a pooling of national sovereignty by the UK and the Republic with the aim of overseeing a power-sharing experiment between the two sectarian parties in a devolved administration at Stormont Castle. The experiment has worked only up to a point: failure by the Unionists and Sinn Fein to agree on what to do next, not least over Brexit, has left Northern Ireland without a devolved government since January 2017.

Brexit has badly destabilised the Good Friday Agreement and risks its collapse. Ireland, entirely supported by the rest of the EU, insists that a backstop is included as an integral part of the Article 50 deal to ensure that the essential elements of the 1998 agreement in terms of North-South cooperation will continue in the event of there being no UK-EU deal. Mrs May accepted the principle of an Irish Protocol to the Withdrawal Agreement first in December 2017 and again in March, but under pressure from the DUP and her own Brexiteers has since qualified her acceptance in practice.

Not everyone at Westminster appears to appreciate the extent to which the Belfast Agreement is an instance of European integration – difficult to arrive at and precious to conserve. Some Tories are still in denial about the joint British-Irish nature of the regime in Belfast, and object to Northern Ireland being picked off by the EU as a special case, whose future governance is being made subject to an effective veto from Dublin.

Since the unnecessary general election in June 2017, the survival of Mrs May's government hangs on the continued support of MPs of the Democratic Unionist

Party at Westminster who are adept at exploiting the new alliance between Ulster Unionism and English nationalism. But all is not smooth sailing for the DUP. Although they continue to oppose the backstop, it is obvious that its eventual application would put Northern Ireland in the uniquely advantageous position of free-riding in two customs unions at once. And the DUP are known to fear that a reimposition of a hard border – the default position without the backstop – would be the surest way to drive public opinion in Ulster towards the reunification of Ireland and the dismemberment of the United Kingdom.

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The backstop says that, in the event of no deal, Northern Ireland will remain in the EU's customs union and its single market for goods. The language is abrupt, and the EU is willing to adapt the tone of the draft Irish Protocol to soften the sense that the Brussels will treat Northern Ireland like a colony.<sup>5</sup> A review clause might also be inserted. But the EU's insistence that the backstop should be 'all-weather' and permanent has grown over the months since the Brexiteers scaled up their opposition to it. The British premier now knows full well that, in the end, and aided by some careful editing, the Irish Protocol will have to be accepted by the UK if the Good Friday Agreement is to be salvaged and a Brexit deal reached.

Theresa May had hoped that her proposed temporary customs arrangement would annul the need for the Irish backstop if it succeeded in keeping open the Ulster border and ensuring the smooth flow of goods from Great Britain across the Irish Sea. Extending the transition period could also, in her view, obviate the need for the backstop. However, the EU side has made it plain that, as far as it is concerned, extending the transition period is not a substitute for but a supplement to the Irish backstop. A longer transition period will be needed to negotiate the temporary customs arrangement requested by Britain.

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## THE POLITICAL DECLARATION

For the EU 27 the question then arises as to how much an interim deal on the temporary customs union will pre-empt the negotiation of the final, long-term free trade agreement with Britain. This is a matter for the Political Declaration.

The Political Declaration on the framework for the future relationship between Britain and Europe will be delivered in two stages. The first presentation, which was due to have been delivered at the European Council on 17-18 October, will set out the heads of agreement over the whole spectrum of policy and institutions. The plan was to let the British media and Westminster recover from the shock of discovering the scope and depth of the sought-after Association Agreement before moving on to stage two. Publication of the Declaration will certainly draw a lot of political flak in Britain.

The two-stage delivery, however, is also needed by the EU 27. Some member states have not played a particularly active role in the Article 50 process, but no state can afford to sit idly by while such an important document on the future of the Union is being prepared for delivery to London. All the leaders need a chance to elaborate their own thoughts on the first draft before the full and final version is released.

Despite the delay in presenting the Political Declaration to public gaze, Theresa May told the Commons on 22 October that there is already "broad agreement on the structure and scope of the future relationship". But she knows that the EU will not present the Political Declaration unless and until the UK agrees the inclusion of the Irish backstop in the Withdrawal Agreement. Because the timetable has slipped so badly, all eyes are now set on the completion of whole deal, Withdrawal Agreement plus Political Declaration, at the scheduled European Council meeting on 13-14 December.<sup>6</sup>

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I have argued before, contrary to most Brexit commentators, that to do its job of steering Europe in one direction, the Political Declaration has to be politically binding on the UK and the EU 27, with the effective force of soft law.<sup>7</sup> A decision on its precise legal status, and how it should be referred to in the accompanying Withdrawal Agreement, has still to be taken. If the Declaration is deemed a success, it will serve as the first draft of the mandate that will be given by the EU Council to the Commission to negotiate the Association Agreement.

A senior British official complained to me that "We all agree on the policy ... it's their [the EU's] sequencing that's so frustrating". To be fair, the UK is correct to

argue that the deal on Ireland will be made much easier when the final landing zone has been clearly identified – and that is the job of the Political Declaration. But David Davis, Dominic Raab's predecessor as Brexit minister, once accepted the EU's proposed sequencing without demur. There are many people in Brussels who can wax eloquently about Britain's fickleness throughout the Brexit process which has only compounded the consequences of its initial error in triggering Article 50 when wholly unprepared for what might follow. "Put simply," said an EU official involved at a high level in the talks, "it's a question of trust. Nobody trusts the May government to deliver."

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### **It is hoped that once the Political Declaration is published the context of Article 50 changes and a more trustful climate can be restored.**

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Mrs May wants cast-iron guarantees written into the Withdrawal Agreement and the Political Declaration that the temporary customs arrangement and the future Association Agreement will in fact be concluded. In the circumstances, however, the best she can expect is a clear commitment to negotiate in good faith towards a final treaty that enshrines in law the deep and special partnership that both sides badly need. The Political Declaration, much more readable than the Withdrawal Agreement, should help to counter the unrealities that pepper the current Brexit debate at Westminster.

It is hoped that once the Political Declaration is published the context of Article 50 changes and a more trustful climate can be restored. The quarrel over Ireland will be put in relative context. The Union will be able to clarify how it intends to maintain its level playing field against British attempts to undercut European business. The apparatus of joint governance, including the role of the European Court of Justice, can be fleshed out. The more substance in the Declaration, and the more legal weight accorded it, the greater the certainty for citizens, investors and business and for the UK's erstwhile partners that, notwithstanding the current chaotic condition of British politics, the British state will deliver its promise to execute an orderly withdrawal.

## **THE DEAL**

Despite panic attacks at Westminster, the two negotiating teams of Michel Barnier and Olly Robbins continue to move closer to each other. Agreement on the customs union and on transition extension seems secure. There has been completion on Cyprus and Gibraltar and other outstanding issues too. Irish backstop aside, the Withdrawal Agreement is ready to be signed. Logic impels one to assume there will soon be a deal. Nobody will find it a perfect deal, but it will

succeed in extricating the UK from EU membership while minimising collateral damage to the rest of the EU, and it will orientate everyone towards a final Association Agreement via a flexible transition period. Ultimately, a deal is better than no deal.

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What then happens to Mr Barnier's deal at the hands of the British parliament is another matter on which others are more qualified to speculate than I. What seems clear, however, is that there is no Plan B that can command an alternative consensus in such a short time as there is left, and there is little prospect of an early general election.

Like it or not, the EU has to deal only with the British government of the day – a point stressed regularly by the Barnier team to supplicants on day trips to Brussels from the UK's numerous, but equally ineffective, opposition parties. The EU knows that if Mrs May falls any Tory successor is likely to be even more difficult to deal with. The EU's one and only goal, therefore, is to reach a deal with the May government under the auspices of Article 50, and to do so within the next six weeks.

Once the current stalemate over the Irish backstop is overcome, things should be able to move rapidly to a conclusion. Any politician at Westminster then seeking to defeat the deal will have to explain how they would prevent a cliff edge, no deal Brexit from happening as scheduled on 29 March. The European Council will not extend the Article 50 talks themselves unless confronted with reasons of *force majeure* – and then not beyond the date of the European Parliament elections on 23-26 May 2019. Brexit, I think, still means Brexit next year.

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- <sup>1</sup> I have written previously in this series for the European Policy Centre on Chequers and the subsequent White Paper in *Brexit: Last call*, 4 July 2018, and *Brexit: Beyond the transition*, 21 August 2018.
  - <sup>2</sup> <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>
  - <sup>3</sup> Alternatively, the Council could only reject the extension by mounting a qualified majority against the proposal (reverse QMV). For a further discussion see Tobias Lock and Fabian Zuleeg, *Extending the transition period*, European Policy Centre, 28 September 2018; and Kenneth Armstrong, *Transition Time: 3 Options for Extending the Transition Period*, 24 October 2018, [https://www.cam.ac.uk/sites/www.cam.ac.uk/files/transition\\_time\\_3\\_options\\_for\\_a\\_new\\_transitional\\_periodths.pdf](https://www.cam.ac.uk/sites/www.cam.ac.uk/files/transition_time_3_options_for_a_new_transitional_periodths.pdf)
  - <sup>4</sup> The bespoke PEACE programme alone will have contributed EUR 1.57 billion to 2020.
  - <sup>5</sup> Tony Connelly explains more of the detail of the evolution of the Irish Protocol in two pieces for RTE on 20 and 27 October, at [www.rte.ie](http://www.rte.ie)
  - <sup>6</sup> I have described how things were intended to go in *Brexit: When the music has to stop*, European Policy Centre, 9 October 2018.
  - <sup>7</sup> The Political Declaration will not be a sacred text, but if the 27+1 decide later to alter course, the decision to do so will have to be of equal weight.

## MISSION STATEMENT

The **European Policy Centre** is an independent, not-for-profit think tank dedicated to fostering European integration through analysis and debate, supporting and challenging European decision-makers at all levels to make informed decisions based on sound evidence and analysis, and providing a platform for engaging partners, stakeholders and citizens in EU policymaking and in the debate about the future of Europe.

The **BrexitForum@EPC** looks at the implications and potential consequences for those who will find themselves outside the Single Market but seek ways to influence its direction in the future as well. EPC analysts and other experts are providing insights and expertise with a view to helping them prepare for the post-Brexit era. Findings from discussions and related publications will provide participants with a better understanding of the UK's future relationship with the EU.

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