

Brexit: How the Political Declaration can rescue the Withdrawal Agreement

Andrew Duff



Credit: OLIVIER HOSLET / POOL / AFP

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In dogged pursuit of her deal, Theresa May continues to try to win over some Brexiteer MPs to ratify the Withdrawal Agreement. Nobody else believes she can do this. We all may be wrong: the prime minister is evidently a remarkable woman.

She is also very stubborn. She refuses to accept what the leaders of the European Union tell her — namely, that they will not allow the British to guillotine the Irish Protocol or to modify its terms unilaterally. The Irish backstop is a temporary device due to remain “unless and until” something better comes along. The EU is mightily puzzled by the British obsession with the backstop — which, after all, were it ever to be implemented, would put Northern Ireland into a uniquely privileged partnership with the EU.

Pro-European MPs would do well to ask themselves, if the Withdrawal Agreement is really such a bad deal, why the Brexiteers are so determined to destroy it.

The prime minister’s last-ditch tactics are truly bewildering. The arch-Brexiteers whom she targets are only a quixotic minority in the Commons. Most MPs are not Brexiteers but dejected Remainers, anxious

The Political Declaration

Published in its full version on 22 November, the 36-page document is a curious beast.¹ Its purpose is to hold the UK and the EU 27 to the negotiation of a new association agreement that will govern comprehensively their future unique and special partnership.

Neither party, to be frank, has been sufficiently well prepared for this exercise: the UK, as we see, has had no settled view about what it wants after Brexit, and the EU side has managed to evade a deep reflection on the future of Europe without the Brits.

Article 50(2) TEU says merely that the arrangements for Britain’s withdrawal from the Union shall be drawn up “taking account of the framework for its future relationship”. But setting out that framework must not pre-empt the actual negotiation of the association agreement, which must be undertaken, as far as the EU is concerned, under a different legal base, in accordance with a different procedure, and only after the UK has actually left the Union.²

to respect the result of the 2016 referendum but determined not to burn all bridges with Europe.

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Fearing no deal above all, this large but leaderless cohort is surely persuadable that the package deal on offer from the EU — the only one available — should be supported. Pro-European MPs would do well to ask themselves, if the Withdrawal Agreement is really such a bad deal, why the Brexiteers are so determined to destroy it. Disappointed Remainers should tell Mrs May that the more she concedes to the anti-Europeans, the less likely it is that Pro-Europeans will back her deal.

The prime minister should focus her efforts on winning greater clarity and reassurance about the long-term future relationship as set out in the Political Declaration. While the EU refuses, quite rightly, to reopen the Withdrawal Agreement and the backstop, it would be willing, on receipt of a decent proposal from London, to reconsider aspects of the Political Declaration.

Everyone is well aware that the impressive unity shown by the 27 during the Article 50 process will be under greater strain when it comes to the future trade negotiation with Britain. For the EU, therefore, the Political Declaration is only the first stab at the mandate that will be issued by the European Council to the Commission for the conduct of the negotiation of the association agreement. Drafting the heads of agreement of the future treaty between 27 nervous member states and a chaotic British state has been a delicate business.

The draft Declaration had to reflect both the guidelines for the Article 50 process set by the European Council and the red lines of the British government. The former were defensive and technocratic while the latter were narrow and negative.

Although both sides have shifted position, most obviously since the Chequers agreement in July, divergence between the two parties has limited the fluency and utility of the Declaration.³ Produced without public consultation, the document has been criticised

variously in the British parliament and media for being incomplete, ambiguous — and too short as well as too long. It seems to have suited everyone in London to dismiss the Declaration as ‘non-binding’ blah-blah.

The only way MPs can block no deal is by doing a deal. Otherwise, the EU will continue to fast-track its own contingency plans to pull out of the UK on 29 March.

Brexiters dislike the Political Declaration because it postulates a close permanent association with the EU. Remainers have largely ignored it and instead have taken to quarrelling among themselves about other supposed models for the future relationship — ‘Norway for now’, ‘Norway +++’, Switzerland and even Turkey.

Amid the confusion, the delusion has grown that all MPs have to do to prevent the UK from crashing out without a deal is to say so. That is not true. The only way MPs can block no deal is by doing a deal. Otherwise, the EU will continue to fast-track its own contingency plans to pull out of the UK on 29 March.⁴

As the threat of no deal grows, therefore, it is not just the Conservative government which provokes dismay in Brussels. Although the Labour party’s Brexit policy is even at this late stage a work in progress, its first pitch would seem to involve permanent full membership of the EU customs union somehow coupled with only partial adherence to the common

commercial policy. Labour leader Jeremy Corbyn agrees with the prime minister that Brexit means leaving the single market and stopping freedom of movement of people. He also opposes EU state-aid rules and competition policy.

It is a pity that the opposition parties at Westminster have failed to recognise that the Political Declaration is essentially permissive, allowing for a broad spectrum of different outcomes, including a free trade agreement, participation in the single market and membership of a customs union. The EU continues to repeat that it stands ready to adapt its own position as and when British red lines soften. As the Political Declaration makes clear, the strength of the future economic partnership rests entirely on the extent to which the UK is ready to respect the EU acquis.

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The document also spells out how close political cooperation can be achieved in non-economic fields, and establishes a coherent system of joint governance, based on the model of the Ukraine Association Agreement, that neither Norway or Switzerland enjoys. The Political Declaration deserves a better press.

Improving the Political Declaration

In the circumstances, it is hardly surprising that the European Council of 13-14 December evinced its lost confidence in Theresa May. Beyond a short statement on the importance of continuing the Brexit process, and of intensifying preparations for no deal, President Tusk says he has no mandate to negotiate further with the British.⁵ “The Union stands by this agreement and intends to proceed with its ratification. It is not open for renegotiation”. He added, nonetheless, that “we are ready to discuss how to facilitate UK ratification”.

So what changes to the (famously ‘non-binding’) Political Declaration would be at once acceptable to the EU and serve to ratify the Withdrawal Agreement in Britain? How can the document be improved to overcome misunderstandings about its purpose and to meet some of the stated objections to it?

Here are some proposals for a judicious tweaking of the document.

THE BASICS

We read that the Declaration “establishes the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation.”⁶

“The future relationship will be based on a balance of rights and obligations, taking into account the principles of each Party. This balance must ensure the autonomy of the Union’s decision making and be consistent with the Union’s principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms. It must also ensure the sovereignty of the United Kingdom and the protection of its internal market, while respecting the result of the 2016 referendum *including with regard to the*

development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom.”⁷

Removal of the last phrase (italicised) would indicate at once that the UK was prepared to soften its previous red lines in the knowledge, first, that it is less likely to be able to strike the global trade bargains that it had once claimed were possible, and, second, that the British labour market will continue to require a sustained mobile workforce of EU citizens.

The EU now agrees to keep the whole of the UK within the customs territory of the EU at least until the new association agreement enters into force. To return the compliment, the UK should now drop the reference in the Political Declaration to its former red lines.

Only Brexiteers, it seems, still cling to illusions of pristine independence and national self-sufficiency: even the prime minister, for whom reducing immigration remains an important objective, has been listening to business anxieties about British exclusion from the EU’s customs union and to business needs with regard to employment. In a major concession after Chequers, the EU now agrees to keep the whole of the UK within the customs territory of the EU at least until the new association agreement enters into force. To return the compliment, the UK should now drop the reference in the Political Declaration to its former red lines.

IRISH BACKSTOP

The Political Declaration affirms the intention to replace the Irish backstop with a permanent solution which avoids a hard border.⁸ But the language used is less clear than that of the Withdrawal Agreement. It would be helpful if the more forceful language about the backstop chosen for the European Council conclusions of 13 December could be adopted in the relevant passages of the Declaration:

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“3. The European Council underlines that the backstop is intended as an insurance policy to prevent a hard border on the island of Ireland and

ensure the integrity of the Single Market. It is the Union’s firm determination to work speedily on a subsequent agreement that establishes by 31 December 2020 alternative arrangements, so that the backstop will not need to be triggered.

“4. The European Council also underlines that, if the backstop were nevertheless to be triggered, it would apply temporarily, unless and until it is superseded by a subsequent agreement that ensures that a hard border is avoided. In such a case, the Union would use its best endeavours to negotiate and conclude expeditiously a subsequent agreement that would replace the backstop, and would expect the same of the United Kingdom, so that the backstop would only be in place for as long as strictly necessary.”

MOBILITY

In drafting the Political Declaration, the two sides found it most difficult to agree on the matter of movement of EU citizens to Britain. Under instruction from 10 Downing Street, British officials ceded very little. The chapter of the document on mobility makes for bleak reading.⁹ Predicated on the UK’s decision to suppress the principle of free movement of persons, it was agreed that future mobility arrangements would be based on full reciprocity and national discretion. The two merely “agree to consider” terms for student exchange and the coordination of social security, and to “explore options” for judicial cooperation.

“In line with their applicable laws, the Parties will explore the possibility to facilitate the crossing of their respective borders for legitimate travel”.

In short, post-Brexit Britain would treat EU citizens like third-country aliens. This implies a regression from the arrangements struck in the Withdrawal Agreement for EU citizens resident in Britain and British citizens resident in the EU 27, under which, during the transition period and after, existing citizens’ rights will be largely protected. It is ironic that all this was drafted into the Political Declaration just at the time when it became clear that net migration from the EU to the UK has dropped steeply since the Brexit referendum. Today, more EU citizens are leaving Britain than arriving.¹⁰

This section of the document should be entirely rewritten. It could refer to the contribution made over the years by mobile workers and their families to the productivity of the EU’s open social market economy and to its cultural enrichment. The stated objective should be to manage migration at sustainable levels, to promote travel for study and tourism, and to facilitate migration for business and employment.

On 19 December the British government published a long-awaited White Paper on immigration which seems to indicate a softening of Mrs May’s previous hard line. Quotas are dropped. There will be

twelve-month ‘transitional visas’ for EU job-seekers of all skills. It is important that the Political Declaration reflects the government’s latest, apparently more liberal approach.¹¹

SERVICES

Relaxation of the Political Declaration on the movement of people would immediately open the way for a real improvement to the section on services.¹² The Declaration speaks warmly of concluding “ambitious, comprehensive and balanced arrangements”, delivering a “level of liberalisation in trade in services well beyond” WTO standards. But such ambition is not substantiated by concrete commitments to maintain regulatory alignment in the services and investment sectors of the economy. Here the EU can be more generous to the UK in return for more British generosity over migration: service providers and investors are people, very often mobile. Another improvement could be made in the section on financial services if the UK were to permit a reference to the banking union.

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The Declaration can afford to be more forthcoming on the matter of regulation. Although it speaks of establishing “a framework for voluntary regulatory cooperation in areas of mutual interest”, little is said of the need for the British state to erect a new apparatus of regulators to compensate for the loss of the EU regulatory framework across almost all spheres of the economy. These new home-grown regulators must be independent of ministerial control, open to stakeholders and equipped to engage with the European Commission on the verification of equivalence with EU norms. The two parties “agree that close and structured cooperation on regulatory and supervisory matters is in their mutual interest”. Having willed the ends, they should will the ways and means.

GOODS

The Declaration is on firmer ground when dealing with trade in goods.¹³ The two sides want “a trading relationship on goods that is as close as possible” — a free trade area “combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition”. The economic partnership will “build and improve on the single customs territory provided for in the Withdrawal Agreement”.

(One wonders if anyone in the Labour party has read this.)

Understandably, the EU is keen not to open the door to wholesale British freeriding on the back of its trade and professional agencies. It is agreed that the two sides will “explore the possibility of cooperation of the UK authorities with Union agencies such as the European Medicines Agency (EMA), the European Chemicals Agency (ECHA) and the European Aviation Safety Agency (EASA)”. But this is an inadequate response to the obvious need for British associate membership (without voting rights) of up to thirty EU bodies relevant to the smooth operation of a deep and comprehensive free trade area, including those that regulate (Labour should note) workers’ and consumer rights and environmental protection.

LANGUAGE

The language of much of the Declaration often fails to emit a sufficiently strong sense of commitment to the conclusion of the future partnership treaty. A thorough edit would usefully provide greater clarity and bring momentum to the impending negotiations. For example, “in this context, the UK will consider aligning with Union rules in relevant areas” would be better rendered, without subverting the intention, as “will align with”. There are many similar instances in the document where “may” can be replaced by “should”, and others where “could” or “should” ought to be replaced by “will”.¹⁴

Scrapping tentative and conditional tenses and adopting more affirmative and imperative language can be achieved skilfully without predetermining the outcome of the negotiation. It would also help Mrs May. Injecting a dose of optimism into this Brexit business would be no bad thing.

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SECURITY

The chapters on the security partnership evince more confidence, not least because the EU is happy to recognise the value of the UK’s continuing contribution in this field. One lapse that needs to be addressed, however, is the negligent sentence which reads:

“The Parties should consider appropriate arrangements for cooperation on space.”¹⁵

Indeed, they can and must.

It would also be useful for British purposes to repeat what the Withdrawal Agreement says about

the possibility of reaching an early agreement on security and defence policy, and of bringing such new arrangements into force on a provisional basis before the full, comprehensive treaty on trade is concluded.¹⁶

GOVERNANCE

Clearest of all is the section on governance, where, building on the transitional arrangements under the Withdrawal Agreement, robust joint institutions are envisaged of a political, technical and judicial nature. The future EU-UK partnership is conceived as a dynamic one, with the possibility of “review and development

over time”.¹⁷ The EU is ready to concede to the UK more joint ownership of the future governance arrangements than it has granted any other associated state, not excluding Norway.

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The legal standing of the Declaration

The Declaration will accompany the Withdrawal Agreement without being annexed to it. The Preamble to the Agreement notes “in parallel with this Agreement, the Parties have made a Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom”. Article 184 of the Agreement says:

“The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration of 25 November 2018 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.”

The Declaration is politically binding on both parties as they head on to negotiate the future trade and security treaty after Brexit.

Paragraph 138 of the Declaration adds ambitiously:

“In setting out the framework of the future relationship between the Union and the UK, this declaration confirms, as set out in the Withdrawal Agreement, that it is the clear intent of both Parties to develop in good faith agreements giving effect to this relationship and to begin the formal process of negotiations as soon as possible after the UK’s withdrawal from the Union, such that they can come into force by the end of 2020”.

It is accepted that the Declaration is politically binding on both parties as they head on to negotiate the future trade and security treaty after Brexit. The document is an indispensable adjunct to the Withdrawal Agreement and is cross-referenced. If the Declaration has to be changed later, a revision could only be enacted by a European Council decision of equal weight to the one which launched it in the first place.

The document can be regarded as a measure of EU soft law, the breaching of which would have serious political consequences for both parties.

Mrs May asked the December European Council to upgrade the legal status of the Political Declaration to make it binding. It was explained to her why this is not possible under EU law. Nevertheless, the prime minister has a point. The document can be regarded as a measure of EU soft law, the breaching of which would have serious political consequences for both parties. In the event of any litigation, the European Court of Justice would be bound to have cognisance of it.

In a gesture towards the British, the EU should now agree to accord the Political Declaration formal recognition in the preamble to the Council decision that is required under Article 50(2) to conclude the whole legal process of British secession from the Union.¹⁸ The British and European Parliaments should follow suit when they come separately to ratify the package deal.

A closer association

The Political Declaration has many merits and has been unfairly criticised by Remainers. We have suggested some modest amendments here to enhance its standing and to strengthen its purpose in securing a closer association between the EU and its former member state.

The Declaration identifies Britain's future landing zone as an association agreement that borrows elements from comparable agreements with other third countries but improves upon them. It builds without disruption on the continuity and transitional arrangements of the Withdrawal Agreement. It should minimise conflicts over the long term between the EU 27 and the UK. Its joint governance facilitates dynamic developments — even healing at least some of the wounds inflicted by Brexit.

The very vagueness of the Political Declaration was useful for both sides when they had yet to make up their minds about what kind of mutual relationship they were really seeking. Its flexibility and broad scope allow for a spectrum of different outcomes in terms of economic and security partnerships that can deepen and widen over time.

However, now that the Brexit process nears its climax and both parties have a better understanding of the nature of

their future partnership, the Political Declaration should be enhanced in order to give their negotiators a more certain steer. We propose here amendments that would, in particular, by modifying Theresa May's red lines serve to open up UK EU trade in services.

If the British parliament wishes to take back control of Brexit, proposing amendments to the Declaration is a good way to start.

The House of Commons is to have its first 'meaningful vote', at last, on 15 January. Amending the Political Declaration may not be the only way to convince MPs to ratify the Withdrawal Agreement and avoid no deal. But improving the document is a good thing to do in its own right. And if the British parliament wishes to take back control of Brexit, proposing amendments to the Declaration is a good way to start.

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- ¹ https://ec.europa.eu/commission/publications/political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom_en
- ² Article 217 and 218 TFEU, respectively.
- ³ At Chequers the cabinet decided on a regulatory paradigm for future relations with the EU, above and beyond a free trade agreement. See especially my previous papers for the European Policy Centre, *Brexit: Last call*, 4 July and *Brexit: Beyond the transition*, 21 August 2018.
- ⁴ The Commission published its 'no deal' legislation on 19 December. http://europa.eu/rapid/press-release_IP-18-6851_en.htm
- ⁵ <https://www.consilium.europa.eu/media/37508/13-euco-art-50-conclusions-en.pdf>
- ⁶ Para. 3.
- ⁷ Para. 4. The word "independent" should also be dropped from para. 17.
- ⁸ Paras 19 and 27.
- ⁹ Paras 50-59.
- ¹⁰ 27,000 EU citizens came to the UK in the second quarter of 2018 and 30,000 left. *EU net migration turns negative*, Financial Times, 29 November 2018.
- ¹¹ <https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system>
- ¹² Paras 29-39.
- ¹³ Paras 20-28.
- ¹⁴ This point is well made by Steve Peers, *To Boldly Go? Analysis and annotation of the EU/UK Future Relationship declaration*, 8 December.
- ¹⁵ Para. 107. This marks disagreement about the terms of continued British participation in the Galileo programme.
- ¹⁶ Para. 92.
- ¹⁷ Para. 124.
- ¹⁸ Insert: "Having regard to the Political Declaration on the future relationship between the European Union and the United Kingdom." https://ec.europa.eu/commission/publications/proposal-council-decision-conclusion-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en

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