

# Brexit: From revelation to re-accession

**Andrew Duff**

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## ABOUT THE AUTHOR



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# The deal

The deal is done. Agreement has been reached on the treaty which will govern the UK's exit from the European Union in an orderly way on 29 March 2019. The British and European parliaments now have to ratify the treaty.

Ratification is far from assured. Britain's ruling party has in effect collapsed. The opposition parties seem unwilling to rescue Prime Minister May. No alternative prospectus exists that could command a majority in the House of Commons as well as the approval of the EU. If the UK crashes out of the Union without a deal on 29 March, catastrophe follows.

## THE REVELATION

Given the historical importance of the vote on the deal on 11 December, the levels of ignorance and prejudice about Britain's European engagement are astonishing. It is ironic that the EU is only starting to be understood by British politicians and media as the country is on its way out. The moment of revelation is upon us through the prism of Brexit. After 45 years of membership, stopping and reversing the process of European integration across such a broad spectrum of public policy is proving enormously difficult for the British state.

Even now, nearly six years after Prime Minister Cameron launched his Brexit scam at Bloomberg, pro-European Conservative ministers are resigning from the government shocked to discover that the EU insists on cutting many links with post-Brexit Britain. At the same time, eurosceptic ministers are resigning in objection to the UK retaining any legal ties and legacy commitments to the EU.

One can readily sympathise with Theresa May. But in truth she has not handled Brexit well. She launched Article 50 (backed by parliament) before she knew where she was going. She set out her red lines in too categorical a fashion and has been forced to adjust them painfully since. She has won respect for her remarkable doggedness but not for a surfeit of agility or charm. Her party is irrevocably split.

## OPPOSITION OPPORTUNISM

At the same time, the United Kingdom has been ill-served by its opposition parties, almost all of whom promoted the 2016 referendum in the first place and pledged to respect its result. Labour has signally failed to come up with an alternative prospectus for post-Brexit Britain which unites its ranks and could be acceptable to the European Union. Labour's version of Brexit seems to entail staying in the EU's internal market and customs union on a permanent basis while breaking its rules on free movement and state aids.

Having won the populist battle for Brexit but lost the political and economic argument, the Brexiteers in all parties are now bankrupt. The DUP wants the best of both British and EU worlds – and is absurdly opposing the Irish backstop proposal that would deliver precisely what is in the best economic interest of Northern Ireland. The Lib Dems, having ditched their support for the previous referendum now want another one, deciding to oppose the Barnier package deal before seeing it. The SNP watch with envy the special deal being crafted for Northern Ireland and hope that the UK's Brexit crisis pans out well for Scottish independence.

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The European Union, for its part, looks on Westminster with horror – and continues to raise its level of preparedness for all eventualities.

## 'DIPLOMATIC MASTERPIECE'

The Withdrawal Agreement reached at the summit in Brussels on 25 November is a very proficient document.<sup>1</sup> It manages to extricate the UK from its obligations as an EU member state and turn the rights it enjoyed through membership into privileges which will endure, for a period, after secession. On behalf of the EU, it minimises the collateral damage attendant in losing a large and powerful member. Angela Merkel was not wrong to call the Withdrawal Agreement a "masterpiece of diplomacy".<sup>2</sup>

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To soften the blow and to ensure some continuity, a transition period is designed to last at least until the end

of 2020, extendable to 2022. It is only the Withdrawal Agreement that establishes the transition period. If the Agreement is defeated in the House of Commons there will be no transition period. (I am sorry to have to labour this point.) If the UK rejects the Withdrawal Agreement, the country will crash out of the EU on 30 March with

no transition to anything else. The EU is working now at full tilt to put in contingency cliff-edge arrangements that will keep the borders with Britain at least passable, albeit with effort and cost.<sup>3</sup> The UK, alas, is almost wholly unprepared for no deal.

## The Withdrawal Agreement

As previously reported, the Withdrawal Agreement is notable for the fact that the EU has conceded that the UK can stay, at least temporarily, in the EU's customs territory until the future trade agreement is concluded.<sup>4</sup> During this time the UK has to apply the EU's common external tariff, but there will be no tariffs or quotas on goods traded with the EU, and no need for rules of proof of origin. The UK commits to observe the EU's regime of 'level playing field' on labour standards, environmental protection, taxation, state-aid and competition policies.

### JOINT GOVERNANCE

The Joint Committee set up to oversee the management of the Withdrawal Agreement may amend these standards in future. The UK will put in place independent regulatory authorities which will collaborate with the Commission in applying these arrangements.<sup>5</sup>

Britain will follow the jurisdiction of the European Court of Justice during the transition period and continue to pay due regard to its case-law thereafter. Any matter requiring interpretation of EU law will be referred to the ECJ, whose jurisdiction will apply in relevant cases to the UK for four years after the end of the transition period, and in citizens' rights cases for eight years.

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The Withdrawal Agreement establishes an arbitration tribunal of five judges for cases in which the Joint Committee fails to settle a dispute. That this panel will in the first instance have to decide whether or not the case in hand treads on a matter of EU law signifies a concession by the Court of Justice. The Luxembourg court has hitherto always objected to the intrusion of another judicial authority (notably, the European Court of Human Rights at Strasbourg) on to its territory.<sup>6</sup> The arbitration tribunal is one instance of where the joint governance

arrangements crafted for the transition period are an improvement, at least as far as the UK is concerned, on those provided in the EEA treaty for Norway and Iceland.

The transition period in practice will not reduce British engagement with the corpus of EU law and policy, although it will remove British representatives from the EU institutions. The UK will continue to apply EU trade and customs policy and to uphold the EU's international obligations that it entered into when a member state. If the transition period is extended into 2021-22, the UK will have a say through the Joint Committee in deciding its extended financial contributions to the EU budget.

The rights of EU citizens living in the UK and of British citizens living in EU states are well covered in the Withdrawal Agreement, although in some cases it will be up to the individual 27 EU states to secure those rights in terms of national law. Administrative procedures will become more complicated and costly. Future issues around the ability of EU workers and their families to come to Britain will only be decided as part of the final agreement.

Despite Spanish alarms in the last hours, a number of important bilateral deals have been reached between the UK and Spain concerning Gibraltar. Agreement is reached with Cyprus over the treatment of the British bases. The EU's geographical indications on specialities of food and drink will be protected. And the financial arrangements previously agreed are confirmed.

### NORTHERN IRELAND

Under the terms of the Irish backstop, in order to avoid a hard North-South border, Northern Ireland will remain more closely aligned than Great Britain with the EU Customs Code and certain single market rules, especially on agriculture, electricity and state aid. This will in practice be what the Chequers agreement of July called the common rulebook, subject to Commission oversight. The Joint Committee will decide when and, if so, how the backstop will be ended – but this will not happen until a new comprehensive free trade and customs agreement between the UK and the EU enters into force.

The preamble to the Irish Protocol to the Withdrawal Agreement says that the UK and EU have the "common objective of a close future relationship, which will establish ambitious customs arrangements that build

on the single customs territory” described in the backstop. This fuels suspicion among the Brexiteers that temporising is the order of the day meaning that the UK will stay in the EU’s orbit for ever. We will see. But the Good Friday Agreement and the common travel area between Ireland and the UK are protected, and, although never fully understood by many British MPs, that was always going to be a primary objective of the British and Irish governments, as well as the EU institutions, from the outset of the Article 50 negotiations.

Both sides declare they would prefer the Irish backstop not to come into force. For this to materialise, negotiations to turn the heads of agreement of the

## The Political Declaration

The Political Declaration that must accompany the Withdrawal Agreement sets out the parameters for any viable future relationship between Britain and Europe.<sup>7</sup> It is not an optional extra. Nor should it glibly be dismissed by the British as non-binding. Its purpose is to prepare both parties for the serious negotiation of a future association agreement involving trade, security, political cooperation and joint governance. The Declaration, which has been criticised for being both too long and too short, could have set out in more detail the content of the accord that is being sought, but that might have pre-empted the future negotiation itself which, for sound legal reasons, cannot be done on the basis of Article 50.<sup>8</sup> As it was, the trade part of the Declaration was complicated enough for the 27 to conclude. And some vagueness about the future relationship is prudent while the UK makes up its mind about what it really wants.

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The Political Declaration draws on both the European Council guidelines of March 2018 and the British White Paper of July. It is a compromise offering Mrs May not as much as she wanted in the Chequers agreement, but more than the EU had been prepared previously to concede. Its purpose is to establish “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”. It foresees a dynamic relationship “with high ambition with regard to its scope and depth, and [that] might evolve over time”.

The parties envisage a trading relationship on goods that is “as close as possible” given the UK’s insistence on

Political Declaration into legal text will begin as soon as possible after 29 March.

### **THE FUTURE ASSOCIATION AGREEMENT**

Article 184 of the Withdrawal Agreement says that the two parties “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 ... with a view to ensuring that those agreements apply, to the extent possible, from the end of the transition period”.

the development of an independent trade policy and the ending of free movement of people. The free trade area will combine “deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition”. The agreement will “build and improve on the single customs territory provided for in the Withdrawal Agreement”. The regulatory framework will go well beyond WTO rules, and customs will make use of “all available facilitative arrangements and technologies”.

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Trade in services will be “ambitious, comprehensive and balanced ... respecting each Party’s right to regulate”. “Equivalence frameworks” will be established for “voluntary regulatory cooperation in areas of mutual interest”, including financial services, and kept constantly under review, subject to dialogue. The principles of no discrimination, reciprocity and mutual recognition will be subject only to specified limitations.

The section on mobility is the least liberal. There will be visa-free travel for short-term visits, and suitable arrangements for study, research and business.

Agreements will be sought across the whole spectrum of the current acquis, including data protection, intellectual property rights, investment, digital trade, capital movements, public procurement, aviation, road, rail and maritime transport, electricity, gas, civil nuclear power and carbon pricing. It is aimed to reach an agreement on fish, covering access to waters and quota shares, before

July 2020. Cooperation will be continued in global fora “where it is in their mutual interest”, with on-going commitments to international agreements.

The UK will be enabled to participate in EU programmes in science and innovation, youth, culture and education, overseas development and external action, defence capabilities, civil protection and space.

### **‘A SPECTRUM OF DIFFERENT OUTCOMES’**

HM Treasury notes that as the Political Declaration is put into legal text, “there could be a spectrum of different outcomes”. Both sides agree that “we should be as ambitious as possible. The UK has put forward proposals that would enable frictionless trade to be achieved outside the Customs Union and Single Market. That is not something that is accepted by everyone in the EU, but the UK has the ability in the future negotiations to continue to work for its objective of achieving frictionless trade”.

The Political Declaration covers all the elements of a tight security partnership, holding out the possibility of deeper UK engagement than it has actually pursued while a member state. This doubtless reflects the prime minister’s interest in law enforcement and judicial cooperation in criminal matters. The UK is willing to associate specifically with the EU’s PNR legislation and other data exchange arrangements. It wants to cooperate via Europol and Eurojust, to continue to expedite cross-border criminal justice, and to collaborate on anti-money laundering and counter-terrorism financing.

Similar close cooperation is foreseen in foreign policy, security and defence. In the context of political dialogue, the UK will be invited to participate in informal meetings of the Council of ministers of foreign affairs

(Gymnich). London and Brussels will coordinate their sanctions policies. The UK will participate on a case by case basis in EU common security and defence missions, including military operations and intelligence sharing. It will associate routinely with the work of the European Defence Agency and the European Defence Fund and, exceptionally, with PESCO. Famously, there is no agreement at this stage on the UK’s continued participation in Galileo, but cooperation will continue on space policy, development cooperation, cybersecurity, civil protection, health security, illegal migration, and counter-terrorism.

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**Both sides will be heavily involved in these joint ministerial, official, parliamentary and judicial institutions.**

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Another section of the Political Declaration covers the institutions of joint governance. Here one gets a clearer picture of the shape of the future association agreement, and for its dynamic character, and how it will build on the Joint Committee structure established for the transition period in the Withdrawal Agreement. The institutional set-up will be very familiar to those who have followed the story of the Ukraine Association Agreement.<sup>9</sup> Both sides will be heavily involved in these joint ministerial, official, parliamentary and judicial institutions.

A final section of the Political Declaration details the preparatory work needed to schedule the opening and conclusion of the formal negotiations.

## **Ratification**

Given Brexit, the Withdrawal Agreement and Political Declaration form a large package deal that will work for Britain and the EU27 states, including Ireland. MPs who want the best possible deal should vote for it. As Theresa May’s colleagues in the European Council insist, along with the European Commission and Parliament, no other deal could have been negotiated that would look substantively different. The deal postulates a future partnership that is qualitatively more suitable for Britain than the free trade deal achieved recently by Canada, or the narrow regulatory pact that Norway negotiated with the EU in 1991, or the hotchpotch of bilateral treaties endured by Switzerland. According to most economic forecasts, the deal goes some way to soften the blow perpetrated by Brexit.<sup>10</sup>

### **THE COMMONS VOTE**

Inevitably, the package deal enrages arch-Brexiteers because it does not cast Global Britain off into the mid-Atlantic. But most of these people are either discredited narcissists or nationalist fanatics. Why Mrs May continues to try to convince them to support her deal in the vote on 11 December is curious: they will not vote for it, nor ever would. Seeking in vain to limit the division of the Tory party, the prime minister seems haunted by the far-right. If she persists in merely justifying the deal in Brexiteering terms – as taking back control and closing borders – she will deserve to lose the vote.

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The fact is that the Withdrawal Agreement and Political Declaration will only be ratified at Westminster if they attract the support of disappointed but intelligent Remainers. There is a good case to be made for the deal from a pro-European perspective: but that case is not being made.

Improbable as it may seem, the leadership of Labour, the Welsh and Scottish nationalists, Lib Dems and DUP have all announced that they will vote against the deal on 11 December. Several Tory Remainers aim to join forces with the arch-Brexiteers to complete the humiliation of the prime minister.

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## PLANS B

Some MPs, led by Hilary Benn, will support a resolution that seeks to avoid a no deal although precisely how they intend to realise their objective is left unstated. Late to the game, other MPs, following Nicholas Boles, will argue for membership of EFTA and the EEA – a clunky and complicated option that does not promise a result which is in anyway better (and in some variants worse) than that postulated by the Withdrawal Agreement and Political Declaration. Both Benn and Boles would lose the advantage of the transition period if the Barnier deal goes down.

It is highly improbable that the House of Commons left to its own devices can prevent Article 50 from taking its course. Only the prime minister can ask the European Council to extend the Article 50 deadline beyond 29 March, and unless she is specifically mandated by parliament to promote an alternative plan, she will not do so. The EU heads of government are adamant that they will not agree to an extension merely to indulge party political chaos at Westminster.

Nor could Mrs May – or for that matter any other prime minister – revoke Article 50 without the passage of primary legislation to that end by parliament. There has been no majority at Westminster to stop Brexit since the referendum.<sup>11</sup> We will see in the votes on amendments to the ‘meaningful vote’ whether that situation has changed radically.

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If the majority against the prime minister in the ‘meaningful vote’ is less than 100 it would seem reasonable to let her adjust her pitch and have another go.<sup>12</sup> The European Council, which meets on 13 December, might then agree to decorate and flesh out the Political Declaration to make it more attractive to the pro-Europeans, but they will not concede the EU’s own, long-standing red lines.<sup>12</sup> The Withdrawal Agreement is in any case closed. Any attempt to re-open it would be bound to end up with less favourable terms and conditions for the UK.

If the Political Declaration is opened up it is not in the British interest if the 27 fly off in all directions. The European Council needs to use the document as the basis of the negotiating mandate it will give to the Commission, and to set in train preparations for the formal negotiation of the association agreement which it will try to conclude by the end of 2020.

## THE ‘PEOPLE’S VOTE’

If Mrs May loses the ‘meaningful vote’, support for a second referendum will grow. That being the case, one must be honest about the timing of such a vote: it is clearly too late to organise a referendum before 29 March.

Parliament, moreover, is nowhere near being able to agree on the question to be put: even the ‘people’s vote’ people are split on the matter. If a plebiscite posed a binary choice between Mrs May’s deal on the one hand and Remain on the other, the Brexiteers opposing both would be effectively disenfranchised. This would add to the democratic dangers inherent in parliament abrogating for a second time its constitutional duty to take tough decisions on behalf of the nation.

Another referendum on the same topic so soon after 2016, even if it resulted in overturning the verdict of the first vote, would leave the nation at war with itself. While some Leave voters will have had second thoughts after the first referendum about the merits of Brexit, many have not; and others who voted Remain in 2016 will feel that the first

vote should nevertheless be respected. The referendum campaign would be bitterly divisive and the likely outcome tight. Investors, meanwhile, would continue to desert British shores. The EU would be badly destabilised while it waited for Britain's populist adventure to play itself out.<sup>14</sup>

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## Preparing to rejoin the Union

If only it gets its act together, the pro-European majority in the House is in a good position to make demands of the government in return for supporting the Brexit package. Remain MPs should move on from short-term Brexit and return to the cause of long-term British membership of the European Union. The Commons arithmetic provides an opportunity to put the country on the course of EU re-entry, even on a fast track. Opposition parties should demand of Theresa May that the Queen's Speech, scheduled for June, will contain a proposal for legislation to hold a referendum not on the retrospective question of Article 50 but, rather, on the prospective question of Article 49.<sup>15</sup> That vote would lay the groundwork for the next government to trigger an application to re-join the European Union.

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The prime minister is undoubtedly right when she says that the country "just wants us to get on with it". But she must know, after her bitter experience in the top job, that Brexit will not settle Britain's European question. The debate will continue, even as the association agreement outlined in the Political Declaration enters into force. Although practicable as a short-term parking place, the association agreement is unlikely to bring a sense of long-term settlement to the relationship. After 2019 when the new EU

As things stand, there seems no sensible way to reverse Brexit. Instead, Theresa May should target pro-Europeans in her efforts to persuade the Commons to accept the Withdrawal Agreement and prepare for as constructive a negotiation as possible on the basis of the Political Declaration. As an inducement to Remainers to support the package, the prime minister can promise the Commons a decisive role at future stages of the process – for instance, in the July 2020 decision about whether to initiate an extension to the transition period.

leadership is in place, and once the impact of Brexit has sunk in, the EU will be turning again to constitutional reform, leaving the UK as an anxious bystander. The Article 49 option will gain traction: it would be intelligent for the British political class (for once) to get ahead of the game.

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A referendum on triggering Article 49, even held at the same time as the next general election in May 2022, could be expected to erase the consequences of the 2016 vote. It seems reasonable to assume that, after experiencing the hiatus of Brexit, the electorate might soon be in a mood to reconsider the issue of where Britain's European interests really lie. The Queen's Speech could also commit the government to the calling of a Royal Commission or other cross-party enquiry into the UK's long-term European options, paving the way for a fresh referendum campaign led by a new generation of better educated and progressive leaders.

In the meantime, the transition period will ensure that the UK retains the EU *acquis* at a high level. The longer is the delay between leaving the Union and bidding for readmission, the greater the divergence from the *acquis*, complicating and prolonging the accession negotiations. In the best circumstances, the UK's application to

resume membership of the Union could sensibly focus on contemporary practicalities and not on myth and nostalgia. Britain would have seized its earliest chance to catch up with mainstream, mainland Europe, and to recuperate at least some of the losses of Brexit.

We might also rekindle old sentiments. Jean-Claude Juncker, in that way he has, explained the deal to the press after the summit on 25 November:

***“I don’t think Britain will be a third country like other third countries are third countries. There is between us something which are the remainings of love.”***

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- <sup>1</sup> Council of the European Union (2018), “Draft Withdrawal Agreement”, Brussels: Council of the European Union.
  - <sup>2</sup> For an official summary of the 585-page document, see the Commission’s Q&A fact sheet: European Commission (2018), [Brexit Negotiations: What is in the Withdrawal Agreement](#), 14 November, Brussels: European Commission. See also the memo on the [Irish backstop](#).
  - <sup>3</sup> See, for example, European Commission (2018), *A Contingency Action Plan*, 13 November 2018, COM(2018) 880 final, 13 November 2018, Brussels: European Commission.
  - <sup>4</sup> Duff, Andrew (2018), *Brexit: Time to compromise*, European Policy Centre, 31 October 2018, Brussels: European Policy Centre.
  - <sup>5</sup> For a good description of the UK’s new regulatory framework, see Hogarth, Raphael, Alex Stojanovic and Jill Rutter (2018), “Supervision after Brexit: Oversight of the UK’s future relationship with the EU”, London: Institute for Government.
  - <sup>6</sup> Lock, Tobias (2018), *On Thin Ice: the Role of the Court of Justice under the Withdrawal Agreement*, *Verfassungsblog*, 15 November 2018.
  - <sup>7</sup> Council of the European Union (2018), [“Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom”](#), Brussels: Council of the European Union.
  - <sup>8</sup> But of Article 217 TFEU according to the procedures laid down in Article 218.
  - <sup>9</sup> I have covered these issues in several previous papers for the European Policy Centre. See the compendium of EPC publications by Larissa Brunner and Fabian Zuleeg, *Brexit: An unprecedented journey*, 26 November 2018.
  - <sup>10</sup> Notably, HM Treasury, *EU Exit: Long-term economic analysis*, 28 November; Bank of England, *EU withdrawal scenarios and monetary and financial stability*, 28 November; and Centre for Economic Performance and the UK in a Changing Europe, *The economic consequences of the Brexit deal*, 27 November 2018.
  - <sup>11</sup> I do not deal here with the likely decision of the European Court of Justice that a revocation of Article 50 is legally possible. As a member of the Convention which drafted Article 50 I have not been in any doubt as to this hypothesis.
  - <sup>12</sup> If she loses by more than 100, the speculation is that Mrs May would resign, thereby triggering a Tory leadership contest.
  - <sup>13</sup> Alternatively or additionally, the European Council could add another interpreting or clarifying Declaration to the three (on fisheries and Gibraltar) that they attached to the package on 25 November. A declaration of assurance that the Irish backstop really means what it says could be useful.
  - <sup>14</sup> The new European Parliament will assemble in Strasbourg on 2 July. If the UK is still a member state at that stage but has not organised elections in the UK, Parliament will not be legitimate.
  - <sup>15</sup> Article 50(5) reminds us that if the UK wishes to return it must do so via Article 49, which sets out the procedure and criteria for the accession of a new member state.





## MISSION STATEMENT

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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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