
DISCUSSION PAPER

Brexit: What Theresa May's White Paper must do

Andrew Duff

While the British continue to obsess about how to install a customs frontier against the European Union, other vital aspects of Brexit go largely unheeded. The danger grows that no significant progress will be made at the next critical meeting of the European Council on 28-29 June.

The Brexit process has fallen into a vicious circle: the difficult issues of Ireland and customs cannot be resolved unless there is clarity about the nature of the UK's final relationship with the EU. But failure to progress the debate on those two issues impairs the capacity of the European Council to get to grips with the long term. Indeed, the heads of government have not yet had a proper discussion about the framework for the EU's future relations with the UK. They still await from London a proposition that is detailed, coherent, comprehensive and substantive. One hopes the White Paper to be published in June will be this.

True, Theresa May has outlined her wish to achieve a "deep and special partnership" with the European Union after the UK ceases to be a member state. In her Mansion House speech on 2 March, she spoke of seeking "a relationship that goes beyond the transactional to one where we support each other's interests. So I want the broadest and deepest possible partnership – covering more sectors and cooperating more fully than any Free Trade Agreement anywhere in the world today". The prime minister therefore believes that she has already "put forward a plan to negotiate all these outcomes and leave the European Union".¹ But that is not the Brussels view, from where the British prime minister seems much entangled in her red lines on trade and too reluctant to address questions of governance.

Under the terms of Article 50(2) TEU, the Withdrawal Agreement must take account of the framework for the future relationship between Britain and the UK. The framework will be inscribed in a formal Political Declaration, the drafting of which cannot be put off much longer. The European Council intends to finalise the document at its meeting on 18-19 October so that it can accompany and be referred to in the Withdrawal Agreement (although not annexed to it). The Political Declaration will be taken into account by the UK Parliament when it votes on the Withdrawal Agreement as well as by the European Parliament and by the Council in concluding the Agreement.²

The Political Declaration will have legal effect. It is meant to bind the 27 leaders directly, and will form the basis of the mandate eventually to be given by the Council to the Commission to open negotiations with the UK on the final relationship. The document needs to be sufficiently lengthy and detailed to marshal the 27 into a consistent position at the point when tensions between them on trade issues are bound to arise. The current instability and eccentricity of several EU governments add to the urgency of the task in front of Donald Tusk, President of the European Council, in articulating in the Political Declaration a robust common approach to Europe's British problem.

Although Theresa May is not expected to have to sign the Political Declaration – which will emerge under the Article 50 rubric as a paper of the EU 27 – she will have to give it her assent. The UK will be bound indirectly by the terms of the Declaration even though Mrs May might very well not be the prime minister who has eventually to deliver the final post-Brexit deal for Britain. So the Political Declaration needs to commit, as far as is possible, not only this UK government and parliament but also their successors to the pursuit of the defined course of action.

British collusion in the drafting of the Political Declaration is therefore essential. The best way to influence its shape and content would be for the UK government to write down, for its own edification and that of its partners, its concept of the framework for the future relationship and the location of its final landing zone. Although officials have started to prepare such a written contribution, they are doing so without much ministerial direction. The Tory cabinet remains in a state of dumbstruck illiteracy. Moreover, despite manoeuvres to amend the EU Withdrawal Bill which is now wending its way through the Westminster parliament, MPs seem no more capable than the government of defining a coherent prospectus for Britain's future as a European country.

Throughout the Article 50 process, any substantive agreement reached between the two parties has been based on texts tabled by Brussels. Unless London now hurries to put pen to paper, the Political Declaration identifying Britain's future place in the scheme of things will also be crafted on its behalf by those from whom the UK has decided to separate. That may not end well. Drafting the Political Declaration is a sensitive and essential exercise. It would be a disaster if the EU's document did not command broad-based support at Westminster. Here, then, are some suggestions for inclusion in the Political Declaration.

Good neighbours

A good starting point for the Declaration would be the admission that although the UK has decided to leave the European Union, the act of leaving does not resolve the old dilemma of Britain's problematical relations with its neighbours in mainland Europe. Indeed, Brexit throws up many new challenges, not least with regard to Ireland.

How their relationship moves forward is a question of strategic importance for both the UK and the EU 27. It would be pitiable to squander entirely the legacy of 45 years of British membership of the Union. Brexit will not obliterate the memory of the shared experience of integration, pooled sovereignty, common institutions and citizenship. In spite of the political rupture and the breaking away from the constitutional order of the EU, Britain's close economic and cultural ties with the EU cannot be denied. The relationship may be taking a new form, but that form must surely be designed to encourage interaction between the citizens of the UK and the EU, to boost prosperity, and to enable shared security challenges to be addressed in a spirit of solidarity.

The Political Declaration will recognise that both parties aim to develop a special relationship establishing an area of prosperity and good neighbourliness, faithful to the values of the Union (Article 2 TEU) and characterised by close and peaceful relations based on cooperation (Article 8(1) TEU). It should stress that both parties will continue to have mutual interests. It is certainly in the British national interest that the EU succeeds in meeting its own objectives. It would be a calamity if Brexit were to trigger the further disintegration of the Union. Likewise, a weaker, poorer and isolated Britain, sulking 40 kilometres off Calais, would not be an attractive neighbour for the EU. On the other hand, if Brexit heralds a new and positive start in the relationship, the EU may well find in Britain a reliable neighbour and trustworthy partner in protecting European interests on the world stage.

Association agreement

To that end, the future framework will take the form of an association agreement involving reciprocal rights and obligations and establishing the possibility of undertaking jointly a wide range of activities

(Article 8(2) TEU and Article 217 TFEU). The European Council has already stated its intention to establish a close partnership with the UK across a broad spectrum, including trade and economic cooperation, the fight against terrorism and international crime, as well as security, defence and foreign policy.³ In its most recent guidelines (23 March), the heads of government also said that they are ready to evolve their position should the UK soften its red lines. Such evolution will best be made manifest in a written British contribution to the Political Declaration.

The UK, for its part, needs the association agreement to encompass an economic partnership and a security partnership plus horizontal ties regarding governance, data protection and British buy-ins to selected EU programmes.

Both parties, therefore, are already committed in principle to developing in the future a new balance of rights and obligations to replace the one that pertained to membership. A comprehensive association agreement is the neat way to do this. And there is useful precedent in the EU's recent association agreements to show how it can be done.

Economic partnership

The economic risk of Brexit should not be underestimated. Britain leaving the single market and the customs union will leave both it and the EU significantly worse off in material terms. It is vital that the future framework serves to repair the collateral damage of Brexit.

The Political Declaration should expressly recognise the essential economic interdependence of the UK and the EU 27. Sub-optimal political decisions taken for ideological reasons must not be allowed to ruin the operation of the trading and customs relationship. Manufacturing industry is rightly demanding continuity of the existing supply chains that are underpinned by EU internal market law. Europe's future prosperity depends to no mean extent on the competitiveness and integration of its services industry, including banking. Even after absorbing the impact of Brexit, the City of London is very likely to remain Europe's largest pool of liquid finance and primary source of related professional services. The Political Declaration could say so.

The British government is seeking a rules-based trade and investment partnership with the EU 27 that is balanced, ambitious and wide-ranging, and that ensures a level playing field with the EU in terms of competition, state aid, public procurement and intellectual property rights. At the heart of the new economic partnership will be a deep and comprehensive free trade area (DCFTA). The UK and the EU will undertake not to impose tariffs on goods traded across the Channel or to erect non-tariff barriers.

As things stand

As things stand, and unless there is a radical switch in government policy, the UK will no longer be a member of the EU's internal market. So it will be necessary to supplement the DCFTA with a system of mutual recognition agreements, sector by sector, which permit access to each other's markets. The Commission will verify alignment under these agreements with the *acquis communautaire*. The UK aims to minimise misalignment with the EU's product standards and compliance methods. It is willing to conclude Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs) in all aligned sectors. Where UK and EU law is not harmonised, regulatory equivalence may be achieved by voluntary agreement.

As things stand, the UK will no longer be a member of the EU's customs union. Therefore, in order to avoid massive economic disruption caused by the imposition of heavy customs controls at the UK-EU borders, the UK will undertake to retain its adherence to the EU's customs code. Whatever emerges from the conflict in the Conservative cabinet on the matter of customs arrangements, further trade facilitation measures will have to be developed on a pragmatic basis as rapidly as possible, exploiting new technologies. The UK must undertake to strengthen its efforts to stop fraud and counterfeiting. Minimising physical customs

barriers to the passage of goods through Ireland and the Channel ports is a shared objective requiring common solutions.

While the EU will be accommodating on goods, it will be less so on services. Nevertheless, the UK will have to pitch for differentiated access to and the right of establishment within the EU internal market based on current levels of openness and reciprocity. The UK will support the EU's efforts to liberalise its services market, notably in the digital economy.

The association agreement should facilitate, on a fully reciprocal basis and respecting fundamental rights, the visa-free movement of people between the UK and the EU. Terms and conditions about social security, employment rights and family law need to be agreed. The UK is committed under the terms of the Withdrawal Agreement to respect the rights of EU citizens resident in Britain. In the context of the association agreement, the UK will continue to welcome to Britain students, workers and tourists from the EU. EU citizens lawfully resident in the UK will continue to enjoy the right to vote and stand in municipal elections. The UK expects the EU to respond in kind in its treatment of British citizens resident across the EU.

In a change from its original stance, and in a concession to a House of Lords amendment to the EU Withdrawal Bill, the government should maintain the norms established for citizens' rights in the EU Charter of Fundamental Rights. The UK is committed to remaining a signatory of the European Convention on Human Rights: it must also promise to support the accession of the EU to the ECHR.

As things stand, the UK will not be subject to the EU's common commercial policy. Instead, the UK aims to develop its own international trade links. Good luck with that. The Political Declaration might advise the UK that as far as its new trading relationship with the EU is concerned, the Union's existing relations with other third countries, including those in the European Economic Area (EEA), must not be put in jeopardy.

In the overall context of the association agreement, and contrary to what its ministers have been telling the fishermen, the UK wishes to negotiate reciprocal access to fisheries waters and resources with a view to the sustainable management of fish stocks, tariff-free exports and the well-being of fishing communities. Similarly, the UK will largely replicate the Common Agricultural Policy, although HM Treasury wants to reduce the cost of Pillar I direct payments to farmers for food production.

The partnership treaty will include a chapter on transport to ensure open, equal and competitive access to all modes of transportation. The UK will remain a member of the European Aviation Safety Agency.

The UK is keen to continue to make its world-class contribution to the science research and development networks and programmes of the EU, including engagement with the European Research Council. It is committing its universities to continued participation in Erasmus+.

The UK will adhere to the goals of the Paris treaty on climate change. It also intends to retain a leading role in the promotion of sustainable development and in tackling cross-border pollution. It will aim for the inclusion of ambitious provisions in the association agreement in the field of environmental policy.

The UK is putting in place a new regulatory regime that will replicate Euratom in order to ensure the supply, safety and security of its nuclear industry. The energy chapter of the association agreement must cater for the British component of European inter-connectedness in terms of energy supply, security, sustainability and competitiveness.

The UK continues to recognise the need for the Union to safeguard its financial stability. In the context of an overall association agreement, the UK will stand ready to contribute financially to costs incurred on an on-going basis as a result of Britain's selective participation in EU programmes, missions and common activities jointly agreed.

The UK is willing to cooperate with the EU on tax collection and on measures to combat tax evasion. It recognises its responsibilities in ensuring that its overseas territories and crown dependencies comply with European norms of transparency.

The UK is resolved to reach an accord with Spain that will ensure the full application of the agreement in respect of Gibraltar.

Regulation

Britain's regulatory authorities at the level of its national or devolved governments will be responsible for monitoring the implementation of the association agreement across all relevant economic sectors. New watchdogs are having to be created, for example in the field of the environment, with powers to ensure conformity compliance with agreed EU norms, including sanitary and phytosanitary measures. The Withdrawal Agreement prescribes the creation of a new independent body to protect the rights of EU citizens resident in the UK.

The prime minister has accepted the EU's goal of non-regression from the standards in place at the time of Brexit. The UK does not mean to instrumentalise lower regulation as a competitive tool against its erstwhile partners: indeed, the UK has a vested interest in maintaining the norms set in hard-fought EU legislation, such as REACH. So Britain must be able to guarantee that its new regulatory framework will be independent of the political direction of ministers and open in its dealings with private and public entities: the word of a quango will not do. British regulators will be open for inspection by the European Commission, OLAF and the Court of Auditors.

Under the terms of the overall agreement, the UK anticipates becoming an associate member of several EU regulatory or programme delivery authorities, such as the European Medicines Agency, the European Food Safety Agency and the European Environmental Agency.

Security partnership

While a lack of clarity persists about the future relationship in the economic field because of the uncertainty over Ireland and customs, the Political Declaration can be more fulsome about the future security element of the association agreement. Britain is not about to change its geopolitical stance or strategic alliances. UK membership of G7, NATO and the UN Security Council will be unaffected by Brexit. Britain expects to continue to collaborate closely with EU institutions and EU member states in all matters of international diplomacy. The association agreement must introduce innovatory EU machinery for an unprecedented level of dialogue, consultation, coordination, information exchange and cooperation with a third country across the spectrum of foreign, security and defence policy.

The prime minister has laid out the government's intention to secure an ambitious security and defence treaty with the EU 27 that enables robust political and military cooperation. The UK and France are in any event committed to deepening their bilateral defence collaboration. As part of Britain's wider contribution to European and transatlantic security, the UK is willing to offer a military and intelligence contribution on a selective basis to EU common security and defence policy missions. The UK as a non-member state can even envisage cooperation with the new European efforts to install a system of permanent structured cooperation in defence (PESCO) – efforts which it opposed when a member state. In the interests of joint capability development, the UK is open to associate with the work of the European Defence Agency – as long as it is accepted that it will "require access to both sensitive information and commercial opportunities".⁴

The UK recognises the importance of securing a comprehensive agreement with the EU over the sharing of data and the pooling of intelligence in order to combat terrorism and international organised crime. Britain values greatly its participation in Europol, Eurojust, the Schengen Information System (SIS II) and the

European Criminal Record Information System (ECRIS). The UK wants to continue to operate the European Arrest Warrant.

The association agreement will cover rules for information exchange between police, customs and judicial authorities, support for joint operations between police and security authorities, and for judicial cooperation in criminal matters. The British government undertakes to secure the highest standards of data protection in conformity with the evolving EU acquis. Classified information will be protected under the terms of a bespoke security information agreement.

The UK is a European leader in satellite technology and intends to remain a competitor for EU space contracts. It will seek to conclude a bilateral agreement with the Galileo project, including the encrypted Public Regulated Service. It will remain a member of the European Space Agency.

Britain is one of the world's leading contributors to overseas development funding and humanitarian assistance. Close liaison between London and Brussels will contribute to optimum results in this critical area.

Governance

Governance of the association agreement will have to reflect the scope, depth and ambition of the post-Brexit relationship. The EU institutions and UK government will be jointly responsible for the good implementation of the new partnership. The system established needs to be effective, durable and democratic. It must ensure legal certainty.

The Political Declaration is the place where the UK can stake its claim to there being joint governance of the future partnership – a matter on which it has been reticent for too long. British thinking about governance has evolved farthest in the matter of internal security. Here the government finds a "range of existing legal precedents for strategic agreements that provide for EU-third country cooperation on a particular area of the acquis. Such models all have the same basic proposed structure – an agreement with overarching horizontal provisions enabling cooperation on the basis of existing EU measures in a specific field, with relevant measures listed in annexes. *Sustaining cooperation on the basis of existing EU measures represents the most efficient and effective means of achieving our shared objectives*".⁵ The Political Declaration could usefully cut and paste those words and give them wider application across all policy areas covered by the envisaged association agreement.

As the two sides prepare to open negotiations on governance, they will have to cater for joint institutions of a political, technical, parliamentary and juridical type. The institutional apparatus must underpin and facilitate a dynamic relationship between the UK and the EU that is capable of evolving as needs, circumstances and political objectives change.

In the context of the overall association agreement, British cooperation with the EU will be steered by regular meetings at summit and ministerial level, and managed by sectoral technical committees. The ministerial association council will be authorised to adapt the annexes to the agreement. There will also be a consultative parliamentary committee between the Westminster and European Parliaments as well as a civic platform, composed on the EU side by the Economic and Social Committee. All these bodies will be composed jointly of British and EU representatives, and decision-making will be by consensus.

Judicial cooperation

Brexit means that the Court of Justice of the European Union (CJEU) will cease to have direct jurisdiction within the UK. Nevertheless, the UK government will continue to respect the autonomy of the EU legal order and British courts will be informed by jurisprudence of the CJEU on matters of law relevant to the application of the future agreement and to the new partnership as it evolves. The UK will acknowledge the right of the CJEU to be the sole arbiter of EU law.

The application of the association agreement will require regular judicial interpretation as well as efficient dispute resolution and enforcement measures in case of non-compliance. For these purposes, the UK should make the bold innovative proposal to establish a joint EU-UK court. Although such an idea was resisted by the CJEU thirty years ago at the time of the setting up of the EEA, things have moved on. The prerogatives of the European Court are more entrenched than they were; the corpus of EU law and jurisprudence is wider; the process of integration is deeper; the size of the Union has doubled; and the secession of a large state after many years of membership posits the likelihood of a large volume of complex legacy litigation.

In fact, Brexit presents a unique set of circumstances demanding fresh thinking, including by the Court of Justice. British and EU judges sitting alongside each other (as they have done during the many years of membership) is the best way to secure tight judicial control over the implementation of the association agreement. Where it proves impossible to arbitrate a dispute caused by irreconcilable differences, the relevant parts of the association agreement would be disappplied.

As things stand, ideological hostility to the European Court of Justice has so far prevented the UK from signing off on all the Commission's proposals for a Joint Committee to manage the application of the Withdrawal Agreement.⁶ The prime minister should drop these inhibitions in good time before the June meeting of the European Council.

The Joint Committee is the key to the sound management of Brexit. It works not only in the interests of the Commission and the British government but also for those stakeholders who will experience obstacles and misunderstandings in the implementation of the secession treaty and the conduct of the transition period. The Joint Committee will supervise and facilitate the application of the Withdrawal Agreement. It will work to prevent problems and settle disputes; it will be empowered to modify the Agreement based on experience and to take on new functions. If the Joint Committee is a success, it will have paved the way for the effective joint governance of the final, long-term partnership. The Joint Committee itself could act as the embryonic general secretariat of the incoming association council.

The Political Declaration should record that the UK is fully committed to maintaining and enhancing the special governance arrangements it has agreed under the terms of the 1998 Good Friday Agreement with Ireland in respect of the future of Northern Ireland. Likewise, the UK will continue to participate in the EU's PEACE programme.

Although the UK is leaving the institutions of the EU, it is not a disinterested bystander in debates or decisions about the 'future of Europe'. Given the dynamic nature of the new partnership, the UK should request that its representatives have observer status in any Convention established to revise the EU treaties (Article 48(3) TEU).

Signature and ratification

Mindful of the provisions of Article 218 TFEU that will govern the EU's negotiation and ratification of the association agreement, and of the need to conceive the new relationship in a coherent and comprehensive manner, it is in everyone's interest that there should be one portmanteau treaty (copying broadly the template of the Ukraine Association Agreement of 2014). The two parties should aim to sign the single treaty before the end of the transition period in December 2020.

The association agreement will have the status of a mixed agreement under EU law, needing to be ratified by numerous parliamentary chambers across the 27 member states and the three EEA countries. Provision should be made for its partial application before ratification is completed. The security chapter, in particular, should be implemented as soon as possible.

The UK must propose, as a matter of urgency, that a clause is included in the Withdrawal Agreement that would allow for a time-limited extension of the Brexit transition period in order to secure the careful

preparation and sound implementation of the new association arrangements. As long as the Political Declaration is sufficiently clear and purposeful, the European Council will be minded to instruct the Commission to include in the Withdrawal Agreement provision for a second, implementing phase of the transition period.

On 15 May the government announced that it will soon, and at long last, publish a White Paper on Britain's future relationship with Europe. If this makes a positive and well-argued contribution to the drafting of the Political Declaration, we can expect good results from the European Council in June and a conclusion to the Article 50 negotiations in October.

Without a satisfactory Political Declaration, however, the ratification of the Withdrawal Agreement will be fraught at best and improbable at worst. Unless the European Council and the British government can define together a clear framework for the United Kingdom's future relationship with the European Union, the transition period will end in limbo. If the leaders cannot quickly resolve the Brexit problem long-term, it will not only be Britain put in peril but the rest of Europe too. As Mark Rutte, the Anglophile and eurosceptic Dutch prime minister, reminds us, "de klok tikt".

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

Endnotes

- ¹ Sunday Times, 13 May 2018.
- ² European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship, paragraph 2.
- ³ Statement of the Heads of State or Government and of the Presidents of the European Council and the European Commission of 29 June 2016; European Council (Article 50) Guidelines for Brexit negotiations of 29 April 2017, 15 December 2017 and 23 March 2018.
- ⁴ HM Government, *Framework for the UK-EU Security Partnership*, 9 May 2018, p. 36.
- ⁵ Ibid, p. 15. My emphasis.
- ⁶ Draft Withdrawal Agreement, 19 March 2018, pp. 103-106.

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