

No Clarity, No Closure

Why this Brexit deal
will settle nothing

A report by the People's
Vote campaign

Foreword

The 2016 referendum, which resulted in a narrow win for those campaigning to leave the European Union, has posed perhaps the most complex set of questions ever faced by a peacetime government.

Unravelling decades of cooperation and interconnectivity with our closest neighbours is a breathtakingly difficult task. To do so while also seeking to establish a new trading and security relationship with Europe, as well as avoiding lasting harm to the economy, would have tested any government. I do not envy those who have been charged with it and I never cease in my admiration at the tireless, dedicated work of the civil service in seeking to achieve the best possible deal.

Any neutral observer, however, would have to concede that the proposed deal is significantly less than what was promised for Brexit and worse than the arrangements we already have inside the EU. Put simply, we have conceded too much now and secured too little later.

What is equally, if not more, problematic, however, is that while our terms of departure have been negotiated, our destination has not. We have been told repeatedly that by the end of the Article 50 process we would have clarity about our future relationship with the EU. These assurances are not being met.

A proper understanding about the direction of our trade policy, future customs arrangements and the rules our businesses will follow is not just important for economic stability and planning investment – it is essential for the proper functioning of government.

Issues about how we will regulate air travel and drugs, share data and criminal records, or whether we will continue to cooperate with our neighbours on towering international challenges like climate change are not mere details to be filled in at a later date, they are matters of fundamental importance to the prosperity, security and welfare of the British people.

Foreword

While attention in Westminster has focused almost exclusively on the Withdrawal Agreement and specifically the Northern Ireland backstop, the Political Declaration has received remarkably little attention. This was intended to set out a clear framework for the future relationship. But it does not.

Instead, this 26-page document sets out the choices facing the country that have not been confronted, decisions that will be made at some point in the future, and grand ambitions that may well not be realised. On the central question of Brexit – how closely the UK will align with the EU on customs and rules – the Political Declaration merely says that there are “a spectrum of different outcomes”.

That the country is being asked to embrace this uncertainty, or risk the disaster of a no deal outcome, is extraordinary.

Britain is divided, directionless and hurtling towards a legal deadline, with no idea where we will end up after we cross

it. A responsible government should now acknowledge our predicament: we are not ready to embark on a journey when we do not know where we will end up. We should not leave until and unless we know where we are going. If we do, the only certainty is that the resources, energy and talent of our country will be consumed by Brexit for many more years to come. The nightmare will not end. It will simply take on another form.

I know and understand why there are some people who say we should just get it over with because they desperately want this endless and debate to end. They want to get back to discussing the other big issues that matter to our country, such as health, housing and the environment. But a blindfold Brexit that offers no clarity can never provide closure. It means the arguments about Brexit will just go on and on.

Lord (Bob) Kerslake,
Head of the Home Civil
Service (2012-2014)

What was promised

“Taking back control is a careful change, not a sudden step - we will negotiate the terms of a new deal before we start any legal process to leave.”

Vote Leave, June 2016¹



“Given that all the big issues have already been solved over the years between the EU and countries around the world, and there is already a free tradezone stretching from Iceland to the Russian border, the new UK-EU Treaty should be ready within two years.”

Vote Leave, June 2016²



“Of course, at the point at which we exit the European Union, we will need to know what our new relationship with the EU is.”

Theresa May, 20 December 2016³



“I believe that we can get a free trade and customs agreement negotiation concluded in the [Article 50] period.”

David Davis, 18 January 2017⁴

"I expect, and we are working on, having that future arrangement negotiated by 29 March 2019."

Theresa May, 9 October 2017⁵



"The point of the implementation period is to put in place the practical changes necessary to move to the future partnership, and for that you need to know what the future partnership is going to be."

Theresa May, 23 October 2017



"I want us to have reached an agreement about our future partnership by the time the 2-year Article 50 process has concluded."

Theresa May, 17 January 2017⁶



"There's no question of any kind of a blindfolded Brexit."

Dominic Raab, 9 October 2018⁷



¹ <https://bit.ly/2445hov>

² http://www.voteleavetakecontrol.org/briefing_newdeal.html

³ <https://www.parliament.uk/documents/commons-committees/liason/Prime-Minister-evidence-December-2016.pdf>

⁴ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/scrutiny-of-brexite-negotiations/oral/69311.pdf>

⁵ <https://www.theyworkforyou.com/debates/?id=2017-10-09c.40.6#g51.6>

⁶ <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>

⁷ <https://www.theyworkforyou.com/debates/?id=2018-10-09c.51.0&s=blindfold+speaker%3A24815#g62.0>

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Introduction

The EU27 have maintained impressive discipline while conducting the Article 50 negotiation. How? Because their positions have been decided by Qualified Majority. That's what Article 50 says. So if a member-state wants to press a particular idea it gets nowhere unless it can assemble a qualified majority for it. But the legal basis for any future UK-EU agreement will be Article 218, which lays down that EU positions are decided by unanimity. So, any single member-state, if it feels strongly about something, can dig in and insist. This is what ensures that the third country across the table is in a disadvantageous position. And this is why negotiations take so long.

It is also important to state that Article 50 doesn't require national ratification: but Article 218 does. This of course strengthens the hand of the recalcitrant member-state during the negotiation, and means any single member state can prevent the agreement from coming into effect. This was the case

during ratification of the Canada-EU Trade Agreement (CETA), when the parliament of Wallonia, a region of Belgium, rejected the deal in 2016.

It is for these reasons that Sir Ivan Rogers, the UK's former ambassador to the EU, warned in December 2016 that a post-Brexit UK-EU trade deal might take 10 years to finalise, and still fail.¹

¹ BBC News, 15 December 2016. <https://www.bbc.co.uk/news/uk-politics-38324146>

Goods trade with Europe

What it says in the Political Declaration:

“The Parties envisage having a trading relationship on goods that is as close as possible, with a view to facilitating the ease of legitimate trade... However, with a view to facilitating the movement of goods across borders, the Parties envisage comprehensive arrangements that will create a free trade area, combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition.”

The reality:

The most important words in the Political Declaration are “as close as possible”. No matter how ‘ambitious’ the trade deal, the EU has been consistent throughout the negotiations that Brexit has consequences, and if we leave the instruments guaranteeing seamless and frictionless trade – principally, the single market and the customs union – that necessarily entails more friction and more barriers.

If we take the Political Declaration at face value, the UK will form its “independent trade policy” and the UK and EU will become “separate markets and distinct legal orders”. That makes the UK a third country like any other, negotiating an intensely

complex free trade agreement. This will be a remarkably complex endeavour. The EU’s recent deal with Japan took five years to negotiate and ratify⁸, and there were eight years between the opening of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) negotiations and the agreement’s provisional implementation⁹. It seems barely conceivable that a comprehensive deal which goes further than CETA, and which will require ratification by 27 EU member states as well as regional parliaments, can be concluded by the end of the transition period in December 2020 – indeed, even by the end of the

Goods trade with Europe

by the end of the transition's maximum extension period in December 2022.

The key problem is that we don't know what will need to be negotiated, because the UK still hasn't decided on its negotiating objectives. The government now rarely mentions the July Chequers proposal, which advocated a 'common rulebook' in goods, and in any event the EU comprehensively ruled that out at the September Salzburg summit. Chequers amounted to the free movement of goods but not of services, capital or people – and thus broke the key EU red line of an indivisible single market. References to a 'level playing field' in the Political Declaration suggest a strong alignment to existing EU rules and standards, which upsets many Brexiters, but the wording is so vague that it could mean anything. Fundamentally, the more we integrate, the more freely we will trade, and the more we diverge, the less.

Theresa May declared in 2017 that "the point of the implementation period is to put in place the practical

changes necessary to move to the future partnership and, in order to have that, you need to know what that future partnership is going to be."¹⁰ In other words, we could not have a deal or transition without knowing where that transition was leading. But that is precisely the situation we are now in. The Political Declaration could allow for a distant Canada-style relationship with comparatively little single-market integration, or a Norway-style relationship in the European Economic Area with maximum harmonisation on goods. This Brexit is blindfolded.

Another significant issue is that, without a full single market and customs union, checks will have to be implemented at Britain's borders. If we assume that the UK backstop kicks in, that creates not only a sanitary and phytosanitary border in the Irish Sea (because Northern Ireland will remain in the single market for goods), but across the Channel as well. It is therefore highly likely that Dover will become heavily congested, as roll-on roll-off traffic will be checked on the

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French side for the first time. While not as serious as a no-deal scenario, this could still spell difficulties for Britain's manufacturing supply chains and food and medicine transport. The government, for its part, has not even acknowledged the problem.

'alternative arrangements' will supplant the backstop. While the UK is focused on technology to replace it, various EU sources are foreseeing a customs union to build on it. There is no clarity whatsoever.

The final key unresolved matter, of course, is the backstop. As things stand, there are no technological solutions which will satisfy all sides' red line of an infrastructure-free Irish land border, and that necessitates the backstop as the default status after the transition. In other words, the UK will be in a customs union with the EU for the foreseeable future and perhaps forever. While this will certainly facilitate trade, obviating the need for tariff checks at the Channel ports, it does involve the handover of our trade policy to the EU, and renders the government unable to set any of its own tariffs. Moreover, the UK and EU appear to have radically different ideas about what

⁸ European Commission: <http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/>

⁹ House of Commons: researchbriefings.files.parliament.uk/documents/CBP-7492/CBP-7492.pdf

¹⁰ Hansard: <https://hansard.parliament.uk/Commons/2017-10-23/debates/AAC75F82-E84E-4976-86C8-DCCAFC2A7F97/EuropeanCouncil>

Services trade with Europe

What it says in the Political Declaration:

“The Parties should conclude ambitious, comprehensive and balanced arrangements on trade in services and investment in services and non-services sectors, respecting each Party's right to regulate. The Parties should aim to deliver a level of liberalisation in trade in services well beyond the Parties' World Trade Organization (WTO) commitments and building on recent Union Free Trade Agreements (FTAs).”

The reality:

The reality about services is that the EU will be forced to treat the UK as a third country – and in some cases may in fact wish to do so. The key problem is the Most Favoured Nation clauses in the EU's current free trade deals, which require it to offer existing trade partners the same benefits as it extends to new trade partners. If the EU effectively continued the single market in services for the UK, but without the UK formally remaining in the single market, not only would it breach the political red line of dividing the single market, but it would require Brussels to vastly extend access to, for example, Japan and Canada as well.

A free trade agreement will of course include services provisions. The UK and EU

could continue to offer rights of establishment, non-discrimination in putting contracts out for tender, and mutual recognition of qualifications. But this will all be up for negotiation – and in services, the Brexiters' arguments about leverage are turned on their head. The UK has a comfortable surplus in its services exports, which some in the EU might seek to reduce. Either way, negotiations could be just as fierce over services as for fisheries or agriculture – and given that the Japanese and Canadian deals took five and seven years to negotiate, respectively, the notion that a deal on services will be ready to implement by the end of the transition period in December 2020 (even by the maximum extended period of December 2022) is beyond

Services trade with Europe

fanciful.

The section on the digital single market and data-sharing is woolly. The two sides commit to “facilitate cross-border data flows”, but the declaration offers no detail on how far any harmonisation or coordination should extend. Digital and telecoms companies may justifiably worry both that they will lose elements of their current access, and that they will not reap the benefits of further liberalisation promised by the completion of the digital single market.

One key contested area is financial passporting. The political declaration refers ambiguously to “equivalence frameworks in place that allow them [the EU and UK] to declare a third country’s regulatory and supervisory regimes equivalent for relevant purposes” – but the point here is that the UK could be limited to the status of third countries. Other financial capitals such as Paris and Frankfurt might indeed seek to curtail the power of the City of London, and there is nothing in the political declaration designed

to stop them. It could well be that existing UK service providers must establish subsidiaries in EU countries to guarantee continued levels of trade, taking investment, jobs and tax money with them. Indeed, numerous banks, insurance companies and other financial-services firms have already relocated their headquarters or established subsidiaries, thus eliminating the cross-border element and removing exports from the UK’s balance sheet. Numerous non-financial services companies, such as EasyJet, have done the same.

The Centre for European Reform think tank has estimated that if UK service exports to the EU were to mirror current exports to the rest of the world, financial services exports would be reduced by 60%, insurance and pension services by 19%, and other professional services by 10%.¹¹ As with much else in Brexit, we simply do not know where we are going, and therefore can do little to reassure companies that their jobs, investments and business models are safe.

¹¹ CER: <https://www.cer.eu/publications/archive/policy-brief/2018/brexit-and-services-how-deep-can-uk-eu-relationship-go>

Security

What it says in the Political Declaration:

“With a view to Europe's security and the safety of their respective citizens, the Parties should establish a broad, comprehensive and balanced security partnership. This partnership will take into account geographic proximity and evolving threats, including serious international crime, terrorism, cyber-attacks, disinformation campaigns, hybrid threats, the erosion of the rules-based international order and the resurgence of state-based threats. The partnership will respect the sovereignty of the United Kingdom and the autonomy of the Union.”

The reality:

The Political Declaration proposes a partnership encompassing cooperation among law enforcement and judicial authorities; on foreign policy, security and defence; and other thematic cooperation, in areas including cyber security and counter-terrorism. It combines an implicit acceptance that the UK will lose access to valuable tools and databases, ambiguity on its future status in other areas, and above all, a vague commitment to a comprehensive partnership which, based on strong precedent, is unlikely to be achieved by the end of the projected transition period.

In its aspirations for access to databases and instruments that are vital to the work of the

UK's law enforcement and intelligence agencies, the Political Declaration seeks a more restricted, and more realistic degree of access for a third country than that set out in the Chequers Plan. It suggests that the UK may lose access to security tools that are only extended to members of either the EU or the Schengen area, notably the Schengen Information System (SIS II), the European Criminal Record Information System (ECRIS), and the European Arrest Warrant (EAW), despite previous assurances from the Prime Minister that the UK would retain access to the EAW.

In other cases, as with membership of Europol and Eurojust, the Political

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Declaration provides no further clarity on whether the UK will have an opportunity to negotiate a form of continued membership or association, referring only to future “operational cooperation”, to be determined in the course of future negotiations. Similarly, the UK’s continued involvement in sensitive aspects of defence programmes, including the Galileo satellite navigation system, receives no explicit mention beyond general commitments to collaboration in “relevant existing and future projects”.

This leaves a vague aspiration for a broad partnership, the details of which would need to be negotiated in the course of the transition period. These details cover almost the entire breadth of existing security, defence, law enforcement and judicial cooperation, from how the UK and the EU will provide reciprocal access to databases, such as the Passenger Name Record (PNR) system, to the terms of continued cooperation in Europol and Eurojust, and the future of joint criminal investigation teams.

The Political Declaration acknowledges that several entirely new international agreements will be necessary to underpin the conditions of security and defence cooperation between the EU and the UK, once the latter becomes a third country. These include a security of information agreement, together with implementing agreements, to enable the exchange and protection of classified and sensitive information, and an administrative arrangement to enable collaboration in European Defence Agency projects.

Precedent suggests that even with clear objectives and political will on both sides, the negotiation of this complex set of agreements is not a realistic prospect by the end of the transition period. Comparable instruments have taken many years to negotiate, and some have still not been implemented, as examples related to extradition, data-sharing and law enforcement and judicial cooperation demonstrate.

The Political Declaration implicitly raises the

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requirement for a future extradition arrangement to replace membership of the EAW. However, it took Norway and Iceland, both European Economic Area and Schengen Area members, thirteen years to negotiate an extradition arrangement with the EU¹².

Regarding the proposed security of information agreement, the experience of previous accords on data protection adequacy is instructive. The EU-US Privacy Shield is subject to multiple ongoing legal challenges and the EU-US Umbrella Agreement took five years to negotiate¹³. Both are subject to regular ongoing reviews, and as a future third country, any such arrangement with the UK would be vulnerable to legal challenge, as occurred when the previous adequacy arrangement with the US was invalidated in 2015 by a European Court of Justice ruling¹⁴.

Similar complexities attend any future agreements with Europol and Eurojust. While a small number of non-EU countries, including several non-EU European states, the USA and Canada, have

agreements with Europol, these have generally taken between five to twelve years to conclude¹⁵, and do not enable full access to the organisation or any influence in its operations and strategy¹⁶. A new Europol Regulation, which came into force in 2017, also means that such accords will in future be full international agreements, potentially further complicating the process. With Eurojust, it took Liechtenstein and Switzerland five and seven years respectively to negotiate the relevant treaties, and even then, third countries have direct access to neither the management board nor the organisation's key database¹⁷.

Between the publication of the Chequers Plan in July and the Political Declaration in November, the UK government clearly adopted a more realistic understanding of the practical limits to security cooperation between the EU and a third country. However, the Political Declaration not only leaves the key questions about future arrangements unanswered, but also fails to address the larger issue of how, having left

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the EU, in which it has been among the most influential actors in shaping the international agenda on security, law enforcement and defence initiatives and standards, the UK will establish a new platform from which to do so.

¹² House of Commons Home Affairs Committee, 24 July 2018.

<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1356/135607.htm>

¹³ House of Commons Library, 31 March 2017.

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7798>

¹⁴ European Court of Justice, 6 October 2015. <http://curia.europa.eu/juris/liste.jsf?num=C-362/14>

¹⁵ House of Lords European Union Committee, 16 December 2016.

<https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf>

¹⁶ HM Government, 9 May 2016.

<https://www.gov.uk/government/publications/the-uks-cooperation-with-the-eu-on-justice-home-affairs-foreign-policy-and-security-issues-background-note>

¹⁷ House of Lords European Union Committee, 16 December 2016.

Foreign Policy

What it says in the Political Declaration:

“The Parties will shape and pursue their foreign policies according to their respective strategic and security interests, and their respective legal orders... The Parties should design flexible and scalable cooperation that would ensure that the United Kingdom can combine efforts with the Union to the greatest effect, including in times of crisis or when serious incidents occur... In this regard, the Political Dialogue on Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) as well as sectoral dialogues would enable flexible consultation between the Parties at different levels (ministerial, senior official, working). The High Representative may, where appropriate, invite the United Kingdom to informal Ministerial meetings of the Member States of the Union.”

The reality:

As a member state of the European Union, where decisions on external relations are made on the basis of unanimity, the UK can decide to lead or support an agreed foreign policy of 28 member states. This has allowed us to help design integrated EU responses challenges we cannot resolve on our own, from managing a more assertive Russia to dealing with Iran’s nuclear programme and combating global terrorism. Shaping the external policies of our closest allies on these and other issues maximises British interests and influence and amplifies our foreign policy choices.

The Political Declaration calls for “ambitious, close and lasting cooperation on external action”, but offers little assurance that this will be comparable to our current relationship. It states that “the Parties should establish structured consultation and regular thematic dialogues identifying areas and activities where close cooperation could contribute to the attainment of common objectives.” But there is little indication as to what such fora might look like. What is clear is that the UK will no longer be represented at the monthly meetings of EU foreign affairs ministers. “Structured consultation” and “regular thematic dialogues”

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are suggested in their place, a clear downgrading of UK influence. It is recognition of this that led the former foreign secretaries Margaret Beckett, Jack Straw and David Miliband to argue that the Brexit deal will “relegate [us] from the top tier of global decision making to being a lesser power on the world stage.”¹⁸

The Political Declaration says: “the Parties recognise sanctions as a multilateral foreign policy tool” but offers no clarity on what future cooperation in this area will look like beyond “consultation” and “the possibility of adopting sanctions that are mutually reinforcing.” The contrast between this and the key role the UK currently plays in shaping and maintaining EU sanctions regimes is striking.

There is agreement that the UK and EU “recognise the importance of global cooperation” in areas including climate change, sustainable development, cross-border pollution and financial stability, and that they “should cooperate in international fora, such as the G7 and the G20”. But no clarity is provided as to how or when

this will happen, or through what mechanisms. The reality is that if we leave the EU no UK prime minister, foreign secretary or other ministers will sit in the EU councils where Europe’s policy in these and other areas is decided. UK influence over geo-political decisions will be significantly reduced.

The suggestion of UK participation, on a case-by-case basis, in EU Common Security and Defence Policy (CSDP) missions, raises questions the degree to which Britain would be bound by EU decisions over which we have no say. Decisions on deployment and management of CSDP missions are taken by the EU member states at the monthly Foreign Affairs Councils¹⁹ and non-EU countries participating in CSDP missions are required to associate themselves with any Council decisions taken²⁰. This would mean the UK would have to accept rules that guide the mission’s mandate, without a full say over them.

Ultimately, where we were once leaders, we will find it harder to have our voices heard on the international

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stage and when we do look to take a stand, we will be taken less seriously. The Political Declaration offers nothing but a loose commitment to work together – a sharp contrast with the strong, institutionalised arrangements we have helped build and from which we benefit today.

¹⁸ David Miliband, Jack Straw & Margaret Beckett, 29 November 2018. <https://www.ft.com/content/b33c8c26-f3d4-11e8-938a-543765795f99>

¹⁹ EU External Action Service, 3 May 2016. https://eeas.europa.eu/topics/military-and-civilian-missions-and-operations/430/military-and-civilian-missions-and-operations_en

²⁰ EU Committee, 14 May 2018. <https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/132/13207.htm>

Immigration

What it says in the Political Declaration:

“Noting that the United Kingdom has decided that the principle of free movement of persons between the Union and the United Kingdom will no longer apply, the Parties should establish mobility arrangements, as set out below”

The reality:

When it comes to future migration policy, the Political Declaration is clear on just one thing: the UK Government intends for Brexit to lead to the “ending of free movement of people” between the EU and UK. However, the system that will replace it remains a blank canvas. The only indication is that any solution will be based on “full reciprocity”, meaning how the UK chooses to treat EU citizens will apply in kind for UK citizens moving to Europe.

Everything else relating to immigration is a vague wish-list. The UK and EU will “aim to provide” visa-free travel for short-term visits. But we have already discovered that, while the EU intends to add the UK to its list of 60+ visa-exempt countries, short-stay tourists and business people will end up paying €7 every three years

under the new European Travel Information and Authorisation System (ETIAS).²¹

Both sides will “consider conditions” for people wanting to stay for research, study, training and youth exchanges. That leaves question marks over UK students being able to take part in Erasmus+ or academics and researchers collaborating with colleagues abroad. One might assume these types of immigration are easy to agree, but they are hostages of fortune to the broader post-Brexit negotiations. And what if the transition ends and we go into the backstop period? Will youth exchanges and research programmes be suspended?

The same applies to “social security coordination” for future migrants, such as being able to take out pensions. There is no guarantee we will

Immigration

end up with an agreement that makes it as easy as it is today to retire in Europe's sunnier climes.

And while the Political Declaration states a "commitment" to applying "existing international family law instruments", that leaves the UK outside the more comprehensive EU rules²² which make it easier to settle family law disputes, such as maintenance payments or child abduction cases. Negotiators will have merely agreed to "explore options".

And that's pretty much it. All the other aspects of a future immigration system go unmentioned. That includes: immigration quotas; skill levels of migrant workers; a salary cap on migrants; registration of new arrivals; schemes for key industries such as seasonal agriculture; whether EU citizens will find it easier to move to the UK compared to non-EU citizens, and vice versa.

The UK government has had a stab at unilaterally outlining a future immigration policy. But even its own White Paper admits: "Any agreements we eventually reach with the EU

relating to mobility will be fully compatible and incorporated into our future system."²³ So, EU demands could reshape this vision.

Immigration issues are unlikely to be settled quickly in future EU negotiations. Not least because the Cabinet itself seem divided on key issues, such as net migration targets, salary caps and the definition of "unskilled" workers. Much like EU withdrawal talks, negotiators could again face a confusing set of red lines from a government that doesn't know what it wants.

Add to that the likelihood that the EU will push for a final deal which as close to free movement as possible. EU politicians want to see EU citizens' rights to live and work in the UK reduced as little as possible. And they do not want the UK to be seen to be opting out of just one of the bloc's "indivisible" four freedoms: goods, services, capital and people. Therefore, if the UK wants "frictionless" trade with the EU, the bloc will push for preferential terms on migration. Would this, or a future government in charge of the negotiations, resist? Like so much else, this cannot be

Immigration

known.

²¹ HM Government, December 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766672/The-UKs-future-skills-based-immigration-system-accessible-version.pdf

²² InFacts, 26 September 2018. <https://infacts.org/brexit-could-make-divorces-messier/>

²³ HM Government, December 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766672/The-UKs-future-skills-based-immigration-system-accessible-version.pdf

Rights

What it says in the Political Declaration:

On human rights: “The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR.”

On workers' rights: “The future relationship must ensure open and fair competition. Provisions to ensure this should cover state aid, competition, social and employment standards, environmental standards, climate change, and relevant tax matters, building on the level playing field arrangements provided for in the Withdrawal Agreement and commensurate with the overall economic relationship.”

The reality:

The Political Declaration is at best vague and at worst absent on the subject of rights for workers, women, LGBT+ people and ethnic minorities. The EU has a long history of encouraging the UK to implement important anti-discrimination legislation including on equal pay, part-time workers' rights, shared parental leave and anti-discrimination laws. These have been used to improve employment standards, propel gender equality and redistribute the gendered division of labour as well as making it illegal to

discriminate based on gender identity, race or sexual orientation.

Workers' rights

All major trade unions, as well as the Trades Union Congress (TUC), have come out against the Government's deal, in part because it does not make sufficient commitments to protecting employment rights after Brexit. The TUC have said “working people need a binding guarantee for their rights, now and into the future” which “the government has come nowhere close to

Rights

meeting”.²⁴ With no commitments to specific pieces of legislation such as the Working Time Directive, there is minimal guarantee that the nebulous “employment standards” referenced will be upheld by future governments.

Simultaneously, however, the Political Declaration - if it were to be transferred into a treaty - would likely tie us to most future workers’ rights legislation decided upon by the EU. This is because it commits to preserving “fair and open competition”, something which is also hardwired into the backstop. What this phrase signals is that after Brexit the UK would be forced to take rules from Brussels, or risk losing market access.

Human rights

The Political Declaration makes no mention of women, gender equality or discrimination. It therefore leaves these hard-earned rights at the whim of future governments. Additionally, without the EU, the UK could easily be left behind on gender equality. Without an explicit commitment to

gender equality in the Political Declaration, there would be no legal reason for the UK to keep in step with the EU on women’s rights as this kind of legislation isn’t always tied to competitiveness. Meanwhile, as above, it leaves us as rule takers on all legislation tied to competitiveness, signalling distinct contradictions.

Furthermore, the Political Declaration is deliberately ambiguous on human rights legislation, citing both the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights without making a legal commitment to either document. In reality, by leaving the EU we are losing the Charter of Fundamental Rights of the European Union, giving us less protection and accountability in supranational courts. As for the ECHR, which does not relate to EU membership, we are no clearer as to whether Theresa May will commit to keeping this crucial legislation.

It is worth reiterating that the Political Declaration is non-binding. But if it is a sign of what’s to come, it should be of great concern to human rights and workers’ rights

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advocates alike, side-lining these issues as it does. And if we leave the EU, this will be only the beginning, as these and other protections are placed squarely at the mercy of political and economic choices by future governments.

²⁴The TUC, 31 January 2019. <https://www.theguardian.com/politics/live/2019/jan/31/brex-it-latest-news-developments-uk-may-have-to-delay-leaving-eu-jeremy-hunt-admits-politics-live?page=with:block-5c531124e4b0e0e1bbc24682#block-5c531124e4b0e0e1bbc24682>

Trade beyond Europe

What it says in the Political Declaration:

“[The future relationship] should facilitate trade and investment between the Parties to the extent possible, while respecting the integrity of the Union's Single Market and the Customs Union as well as the United Kingdom's internal market, and recognising the development of an independent trade policy by the United Kingdom beyond this economic partnership.”

The reality:

The UK has set itself the objective of completing complex trade negotiations in at least four areas. First, the Government will need to negotiate a comprehensive set of trading arrangements with the EU. This is likely to take many years. Second, the trade deals with more than 65 countries that the UK is part of as an EU member state will need to be renegotiated to maintain current levels of access for UK businesses. None have been agreed during the Article 50 period, and there is little reason to believe they can be agreed during the transition period.²⁵ Third, the UK must agree 'schedules' with the 163 other members of the World Trade Organisation (WTO) in order to secure independent membership. This process ran into difficulties last year when a number of countries

objected to the UK's proposed import arrangements for agricultural goods.²⁶

Fourth, and crucially, the Government has made big promises about new trade deals with China, the United State, India and many more countries around the world. These have been sold as one of the great prizes of Brexit. Yet there is still no clarity as to when - or even whether - the UK will have an independent trade policy if we leave the EU.

The Political Declaration does state that any future UK-EU agreement should recognise "the development of an independent trade policy by the United Kingdom beyond this economic partnership". But there is no detail or clarity about how that might be achieved, given both sides are committed to preventing the

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emergence of a hard border on the island of Ireland. The Withdrawal Agreement includes a backstop plan that will see the UK remaining within the EU's customs union unless alternative arrangements are in place by the end of the transition period. It also states that the common objective of the UK and the EU is to establish ambitious customs arrangements that “build on [this] single customs territory”. The prospects, therefore, of the UK securing an independent trade policy appear remote.

Whether the UK develops an independent trade policy will depend in part on the extent of regulatory alignment in a future UK-EU treaty. If the UK remains closely aligned to European standards, our ability to conduct an independent trade policy will be limited. For example, negotiating partners, including the US and Australia, have made clear they would demand a decoupling of the UK's agricultural standards from those of the EU as a pre-requisite for negotiating a bilateral trade agreement. However, the Government has promised to uphold current

standards, and polls suggests the public will not support a deterioration of current regulations just to secure new deals.

If the UK ultimately remains in a customs union with the EU, this will bring obvious advantages in trading with Europe, but its ability to establish an independent trade policy would be further impeded. A customs union, at its most basic level, involves all members applying a common external tariff on third-country imports, so the UK would be unable to enter into tariff-based trade deals. The problem is that most free trade agreements prioritise the reduction of tariffs, particularly on agricultural and manufactured goods. The UK could still enter into agreements based on services or investment, or non-tariff barriers for goods (such as labelling), but without the central prize of tariff reductions, few countries would be likely to engage. Moreover, in the single market the UK would also be heavily aligned on services, which would make comprehensive deals with third countries even harder.

²⁵ BBC News, 18 January 2019. <https://www.bbc.co.uk/news/uk-politics-46917999>

²⁶ The Guardian, 25 April 2018. <https://www.theguardian.com/politics/2018/apr/25/resistance-to-joint-proposal-to-wto-leaves-uk-and-eu-divided-us-australi-reject-brexit-trade-plans>

Fisheries

What it says in the Political Declaration:

“The Parties should cooperate bilaterally and internationally to ensure fishing at sustainable levels, promote resource conservation, and foster a clean, healthy and productive marine environment, noting that the United Kingdom will be an independent coastal state... Within the context of the overall economic partnership the Parties should establish a new fisheries agreement on, inter alia, access to waters and quota shares. The Parties will use their best endeavours to conclude and ratify their new fisheries agreement by 1 July 2020.”

The reality:

It quickly became apparent in November that fishing was not only a resonant symbol and prize for both the UK and EU, but that it could also produce a real flashpoint in the negotiations to come. This is covered somewhat elusively in the political declaration with the words “access to waters”. Emmanuel Macron made clear that France would demand access to British waters as the price of ending the backstop, and consequently of enacting any comprehensive trade deal. Already, then, it looks clear that the key prize sought by the fishing industry – ‘more control’ over our waters – will be almost impossible to deliver.

The issue is not simply the

backstop or France’s potential veto over a trade deal. Fishing is a genuine quid-pro-quo area for the UK. The EU wants access to British waters for its fishers, but British fishers need markets to sell into. The UK exports around 80% of its fish, the large majority to the EU²⁸. Already, then, we can see the damage that could be done to the UK fishing industry if the government plays hardball on EU access to waters. Outside the customs union and single market, and without a comprehensive fishing deal, UK fish will face full tariffs on entering the EU market, and compulsory sanitary checks which could drastically hold up the flow of traffic in an industry that depends on fresh goods. Even more crucially affected will be

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the fish processing sector, which makes up the bulk of the industry's output. Outside the single market, there could be problems in standards recognition or in new non-tariff barriers (eg labelling), and outside the customs union UK exports will be subject to rules-of-origin requirements which could force tariffs on products and therefore make much of the industry unsustainable. To reiterate, this is a substantial risk even if the negotiations run smoothly and end on time.

The UK also seeks to leave the Common Fisheries Policy, and negotiate different quotas. The political declaration allows for this, but quotas are based on the 'relative stability' model which depends on historic catches. Any radical change might have to involve 'zonal attachment', which depends more on the geographical location of fish at any one time. Even if such a radical change could be negotiated by 2020, which seems highly unlikely, it could disadvantage fishers in the long run: fish do not respect national borders and if species migrate out of

British waters, UK fishers could find themselves with fewer opportunities, not more.

Amidst such uncertainty, the industry obviously needs to know what will happen if a deal cannot be agreed by the end of the transition period. The backstop is therefore key. As things stand, fishing is the only area of goods not covered by the backstop. Contrary to the Brexiters' political messaging, this was in fact at the EU's insistence: the EU does not want to give automatic tariff-free access to UK fish without something guaranteed in return. Consequently, while the backstop provides for a de facto customs union in the absence of alternative agreements, fisheries faces a default regime of tariff walls, which could cripple both the fishing and fish processing sectors. In other words, not only do we not know where the negotiation will lead, there is not even a guaranteed fall-back option for the industry if those negotiations fail. This Brexit is both blindfolded and potentially devastating.

²⁷ House of Lords EU Committee, 17 December 2017: <https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/78/7811.htm>

Agriculture

What it says in the Political Declaration:

There is no explicit reference to agriculture in the Political Declaration. The closest reference is:

“Disciplines on ... sanitary and phytosanitary measures (SPS) should build on and go beyond the respective WTO agreements.”

The reality:

We have very little idea of what agriculture might look like at the end of the transition period. The Political Declaration does not even cover a basic outline, except for the notion that sanitary and phytosanitary measures (SPS) might exceed basic third-country levels of cooperation. This is extremely serious for the agriculture sector. If we take the UK Government at its word, we are to leave both the single market and the customs union. That means that, even if we end up with a comprehensive free trade agreement, agricultural goods will face rules-of-origin checks at EU borders, as well as rigorous safety checks. That could entail substantial congestion at the Channel ports and significant disruption to an industry that depends on the rapid transport of its goods.

A comprehensive free trade agreement does not even ensure full liberalisation of tariffs, and agriculture is one of the hardest areas to negotiate. The EU's deal with Canada took eight years between the start of negotiations and entry into force and does not open up the markets in poultry or eggs at all.²⁹ Moreover, Canadian goods must still be checked upon entry into the EU. While it is unlikely that any sectors will be totally excluded from a UK/EU deal, it remains the case that agriculture incurs the highest tariffs of any product – frequently well over 40% – and some EU member states may wish to increase the market share for their own producers. It seems almost impossible that a deal could be reached by the end of the transition period in December 2020, or even by the maximum extendable period in December 2022.

Agriculture

The Political Declaration does not mention the Common Agricultural Policy (CAP), but the UK Government has reiterated it will leave it. The EU will be wary of unfair competition, and will almost certainly insist, as the price of any deal, that the UK cannot exceed the EU's level of subsidies. There could be demands for some kind of CAP alignment. As with much else in the declaration, we simply do not and cannot know. And there are of course 'known unknowns': the UK's new competitors in the EU could try to advantage their own producers at the UK's expense in ways that have not yet been envisaged or forestalled.

Unlike fisheries, agriculture is covered in the backstop – principally because of agriculture's importance in the movement of goods over the Irish border. We therefore know that, in the event of no comprehensive deal being reached by the end of the transition, UK agricultural goods will enjoy tariff-free access into the EU.

Realistically, without undiscovered technology there will always be a need for

a customs union, which is why EU sources envisage the backstop forming the basis for a future relationship. But the backstop does not cover the single market. That will necessitate an increase in checks on goods entering Northern Ireland from Great Britain – politically unacceptable for many unionists – and also border inspections at French and Belgian ports, with damaging economic consequences.

In some ways the problem is not that Brexit will be blindfolded, but that the dangers are guaranteed. Under the backstop, the UK will form a part of the EU's customs territory, but will have no formal say over the EU's tariffs. Many of the UK and EU's key trade partners, such as Australia and New Zealand, are seeking tariff liberalisation on agricultural goods above all else. The EU's trade deals with those countries are currently being negotiated and will no doubt be implemented in the coming years. If the UK is still subject to the backstop – or indeed, any conventional customs union – that will mean hugely increased domestic competition for UK

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farmers from Australian and New Zealand counterparts in the dairy, beef and sheep-meat sectors. Not only that, but as a non-EU member the UK will not be party to those trade deals and will therefore receive no automatic reciprocal benefit for its agricultural exports in Australian and New Zealand markets. The Withdrawal Agreement and Political Declaration therefore provide no clear means for UK agriculture to improve in any way, and could do the sector great harm.

²⁸ European Commission: http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156062.pdf