



Lord Boswell of Aynho
Chair, European Union Committee
House of Lords
London
SW1A 0PW

26 February 2018

GOVERNMENT RESPONSE TO BREXIT: DEAL OR NO DEAL

Dear Lord Boswell,

Thank you for your thoughtful report on “Brexit: Deal or No Deal”, HL46, and for arranging a valuable debate on the report in the House of Lords on the 16th of January. On 15 December 2017, the European Council formally confirmed that sufficient progress had been made to enable the UK and the EU to move onto the second phase of negotiations. As the Prime Minister said, this is an important step on the road to delivering a smooth and orderly EU exit and forging a new, deep and special partnership.

Since June we have worked intensively with our European partners to settle the issues in the first phase of our negotiations to leave the EU. The Council has also confirmed that discussions will now begin on trade and our future security partnership. We will continue to work with our European partners with ambition and creativity in the next phase.

Likelihood of ‘no deal’

Your recommendation: While it is sensible to undertake contingency planning for ‘no deal’, the UK must ensure that the very act of such preparations does not increase the likelihood of this outcome.

As I said to the Committee in my appearance on 31 October 2017, and as Lord Callanan reiterated in January’s debate, we are not seeking a ‘no deal’ outcome. We are confident that a future partnership between the UK and EU is in the interests of both sides, so we approach the negotiations anticipating success. My confidence in the likelihood of achieving a positive deal has further increased in the light of our Phase 1 agreement, and agreement to move on to discuss an implementation period and the future UK-EU relationship. Whilst this progress is very encouraging, I believe that it is responsible to prepare for all potential outcomes, including the unlikely scenario in which no mutually satisfactory agreement can be reached. This is exactly what we are doing across government.

The Chancellor committed in November's Budget to ensuring that departments and the Devolved Administrations continue to have the resources necessary to prepare effectively for a range of exit scenarios, including 'no deal'. HM Treasury has already given departments nearly £700 million to prepare for our EU exit, and is making an additional £3 billion of funding available over the next two years.

A point raised in this report and during January's debate in the House of Lords was whether the act of contingency planning could itself increase the likelihood of a 'no deal' scenario. As Lord Callanan said in his response, this is not the case. As more of our contingency planning becomes public, this should not be interpreted as an expectation that talks with the EU will be unsuccessful, but recognised instead as the actions of a responsible government determined to ensure a smooth exit under any eventuality. My department and I will work with other teams to ensure this is communicated as effectively as possible.

The prospects for a 'bare bones' deal

Your recommendation: We urge the Government to clarify, as a matter of urgency, the relationship between a hypothetical 'bare-bones' deal and the Article 50 withdrawal agreement, and also to set out which "fundamental issues" it believes should, of necessity, be included in a 'bare-bones' deal.

We are optimistic that we can achieve a substantive, positive deal on an implementation period and the future relationship between the UK and EU.

We have consistently called for flexibility, imagination and a willingness to make progress in every stage of the negotiations. Even in the unlikely scenario that it is not possible to agree a substantive deal on a comprehensive framework for the future relationship, we therefore hope and expect that the commitment to find practical and mutually beneficial solutions would continue.

There are some areas in which it would clearly be in both the EU and UK's interests to find solutions. For instance, the EU recently published slides on their preparatory discussions about our future relationship in aviation which indicate that it would be in neither side's interest - nor realistic - to envisage a scenario where flights between the UK and EU could not continue. We foresee that agreeing a solution for such critical areas would be possible and beneficial to both parties. For now, however, it is right that our focus and discussions with the EU remain on achieving an ambitious and positive deal.

Citizens' rights

Your recommendation: We reiterate the call in our 2016 report on 'Brexit: acquired rights' for the Government to offer a unilateral guarantee to EU citizens resident in the UK outlining how their position will be protected, whatever the outcome of negotiations. It would then be for the EU and its 27 remaining Member States to respond in kind.

From the very beginning of this process, the Government has been clear that safeguarding the rights of EU citizens living in the UK and UK nationals living in the EU was the first priority for negotiations. This is a commitment that we have delivered and the details are set out in the Joint Report of 8 December 2017.

Providing certainty for citizens is a priority, which is why we will now move to the next stage of drafting legal text for the Withdrawal Agreement. Once finalised, this will enshrine the agreed rights in international law and the UK will give effect to this in UK law.

The new Settled Status scheme for EU citizens in the UK will be up and running in the second half of 2018 on a voluntary basis, enabling EU citizens to apply for this status at their earliest convenience. Any status granted will sit alongside EU law rights until these no longer apply.

Transition, negotiation and withdrawal

Your recommendation: The rigidity of the Article 50 deadline of 29 March 2019 makes a no deal outcome more likely. For the Government to compound the rigidity of Article 50 by enshrining the same deadline in domestic law would not, we believe, be in the national interest.

We will leave the EU at 11pm on 29 March 2019, when we will no longer be a Member State. This is a matter of international law under the Article 50 process.

That is why the Government tabled amendments to the EU (Withdrawal) Bill setting exit day as 11pm on 29 March 2019. These do not change the date or time that we leave the EU; they simply ensure that we have the same position legally as the European Union. However, we have since accepted amendments, tabled by Sir Oliver Letwin, which give the Government the technical ability to amend exit day - but only if the European Council, including the UK, unanimously decides to change the date at which the Treaties cease to apply to the UK as set out in Article 50. Neither the UK nor the EU are planning to use this mechanism. These amendments simply reflect a technical aspect of Article 50.

We are not seeking to extend the Article 50 process; an implementation period does not mean postponing our EU exit.

Your recommendations: The Government has not explained clearly enough what transition is intended to achieve. Instead, it has merged two aspects of transition: a 'standstill period', the promise of which is needed urgently to provide reassurance to businesses, and which may also (although this is not accepted by Government) buy time to finalise an agreement on the future relationship; and an implementation or adaptation period, during which the two sides will move across to the terms of the new relationship in a controlled fashion. We call on the Government to acknowledge that the main drivers for the length of transition are the timing of any agreement on future relations and the time the UK and EU economies need to adapt to its terms. We recommend that, as a matter of urgency, the Government should set out its views on transition.

We want our future relationship with the EU to be a deep and special partnership, taking in both economic and security cooperation. We fully expect to reach a deal, which is in the strong interests of both the EU and the UK. As the Prime Minister has stated in both her Lancaster House and Florence speeches, this includes a mutually beneficial implementation period to provide time for businesses and individuals to adapt to our new relationship.

As I set out in my speech in Teesport on the 26th of January, we are seeking a strictly time limited implementation period, to form a sound basis for the UK's future prosperity. The purpose of this implementation period is to provide time for people and businesses - in both the UK and the EU - to adjust to the new arrangements required by our future partnership in a smooth and orderly way. The implementation period prevents both businesses and governments in the UK and Europe having to make decisions before they know the shape of our future partnership. It also provides individuals and citizens on both sides time to adapt to the new relationship between the UK and the EU and allows businesses time to set up any new infrastructure and systems to support the new arrangements. This means both businesses and public services will only have to plan for one set of changes. The business community has been clear on the importance of this to their planning. During the implementation period access to one another's markets should continue on current terms and the UK should also continue to take part in existing security measures.

The implementation period will also ensure that the transition to our future relationship with the EU is in keeping with legal commitments. The implementation period will give the time for the appropriate legal ratification of our future partnership with the EU, which can only be concluded once we are no longer a Member State.

Your recommendations: We doubt whether the reference to the “arrangements for withdrawal” in Article 50 TEU offers a secure basis in EU law for a ‘standstill period’, and we note also that this question could fall to be determined by the CJEU in advance of any withdrawal agreement being concluded. We therefore recommend that, as a matter of urgency, the Government should set out its views on the bases in EU law for the various elements that make up transition.

This question of the legal basis for an implementation period was raised both in the report and by many when the report was debated in the House of Lords. An implementation period would be agreed under Article 50 and form part of the Withdrawal Agreement. The EU has been clear on this both in their Article 50 guidelines, published on the 29 April 2017, and in the negotiating directives agreed by the EU General Affairs Council on 29 January 2018. The UK Government agrees with this approach.

Your recommendations: Only in the event of an extension do we see any credible prospect that the Government's preferred approach of concluding the withdrawal and future relations agreements simultaneously can be achieved. We call on the Government, alongside its consideration of the legal basis for transition, to review the options for securing a time-limited extension to the UK's EU membership that are legally available under Article 50; to open discussions on these options with the EU negotiators; and to report its conclusions to Parliament at the earliest opportunity.

The UK and the EU have been clear that any implementation period should be strictly time-limited, and that its duration should be determined by how long it will take to prepare and implement the new processes and new systems that will underpin the future partnership. The detail of how the implementation period will work remains a matter for negotiations.

As I set out in my speech on the 26th of January, one of the other benefits of an implementation period will be that it provides the time needed for our future partnership to be legally concluded, given that it is only possible for this to happen when we are outside the European Union.

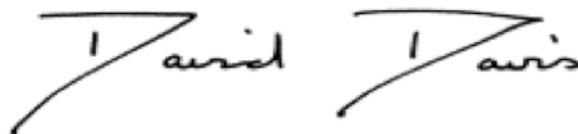
Extending Article 50, staying a member of the European Union for a further few years, would not solve that problem.

Both the directives agreed by the Council and the comments made by President Tusk point to the shared desire of the EU and the UK to make rapid progress on an implementation period. This will help give certainty to employers and families that we are going to deliver a smooth EU exit. As we have done previously we will continue to meet our commitment to keep Parliament informed.

Your recommendations: An early and comprehensive agreement would, in our view, be the best solution for all sides, and we support the Government's efforts to achieve this outcome. However, precedent, and the overwhelming weight of evidence, suggest that it will not be possible. A more feasible objective for the Government is to conclude a withdrawal agreement by October 2018, alongside a political agreement on the principles that will underpin the future UK-EU relationship. We also conclude that if, in order to enable the UK to leave the EU on 29 March 2019, a withdrawal agreement has to be concluded in advance of an agreement on future relations, there will have to be a clear separation between the two.

Article 50 makes clear the Withdrawal Agreement needs to take account of the future relationship so we will know the terms of our new partnership with the EU by the time of our exit. That is the basis from which we have to work. The exact details of the Withdrawal Agreement, which will also provide for the implementation period, are the subject of ongoing and future negotiations and cannot be known until those negotiations are near completion.

I hope you will consider this letter, and previous oral evidence, as a satisfactory response to this report, but we would be happy to follow up any other specific points that you deem outstanding.

A handwritten signature in black ink that reads "David Davis". The signature is written in a cursive style with a large, sweeping initial 'D'.

**RT HON DAVID DAVIS MP
SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION**