

# An “Implementation Protocol” to Unblock the Brexit Process

A proposal for a legal bridge between a revised Political Declaration and the Withdrawal Agreement

Discussion Paper

Kenneth Armstrong  
Professor of European law  
University of Cambridge

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## Executive Summary

On 15 January 2019, the UK House of Commons voted 432 to 202 not to give approval to the texts of the Withdrawal Agreement and Political Declaration negotiated and agreed between the European Union and the UK in November 2018. A “No Deal” Brexit is now the default position unless UK Members of Parliament vote to approve either these texts. With the UK leaving the EU on 29 March 2019 at the end of the two-year negotiating period, there is very limited time available to make any changes. Even if more time was available, there is little appetite to re-open what has been agreed after numerous rounds of talks.

*What is set out here is a proposal to bring the Union and the UK together on a way forward. The proposal is for an **Implementation Protocol** to be added to the Withdrawal Agreement.*

The fundamental ambition of the proposed Protocol is to act as a **legal bridge** between the binding Withdrawal Agreement governing the UK’s withdrawal from the Union and the Political Declaration which sets out a framework for the future relationship between the Union and the UK.

The Protocol would bring together commitments made in the Withdrawal Agreement and Political Declaration – particularly those relating to the negotiation of agreements that would either avoid the triggering of the so-called Irish “backstop” or would supersede it and so bring its temporary application to an end – and set out implementing provisions to make good on those commitments.

The key features of the proposed Protocol are:

- **Simplicity** – in less than 6 pages and in only 5 articles it consolidates and reinforces key commitments spread across 600 pages of the Withdrawal Agreement and Political Declaration.
- **Clarity** – it takes broad commitments to use “best endeavours” to negotiate subsequent arrangements or to “review” the Irish backstop and offers clarity as to how these might be implemented.
- **Legality** – a Protocol is legally binding and would be an integral part of the Withdrawal Agreement alongside the Protocol on Ireland/Northern Ireland.

*The proposal makes two assumptions.*

*The first is that the text of the Withdrawal Agreement is unlikely to be reopened – the proposed Protocol would be a means of clarifying in a legal instrument how the Agreement might be implemented.*

*The second is that changes to the Political Declaration can and should be made to allow an alternative future relationship – the proposal neither limits nor prevents alternative visions of the future EU-UK relationship as the ambitions of the negotiations evolve during the transition and implementation period.*

## Context

The Withdrawal Agreement negotiated and agreed between the European Union and the United Kingdom establishes a period of 'transition' beginning with the UK's exit from the EU and ending on 31 December 2020. The UK Government has always referred to this as an 'implementation' period no doubt because it had hoped that this would also be a period during which the Union and the UK would begin to implement their future relationship. However, the Union always insisted that the future relationship could only be negotiated once the UK had left the Union, taking into account the framework of a future relationship to be agreed as part of the Article 50 withdrawal process.

This gulf in expectations and the contrast in terminology points to a structural limitation in the Article 50 procedure. While the Union and the UK negotiate a legally binding withdrawal agreement – including a Protocol setting out the arrangements for the Irish 'backstop' – the Political Declaration that sets out the framework for the future relationship is simply a political statement of intent. The legally binding treaties that will cement that relationship can only be applied if negotiations are successfully concluded during the transition period.

In the specific circumstances of Brexit – the lack of a domestic political consensus about the type of economic relationship that the Union and the UK should enter into, and concerns that the Irish backstop could by default dictate the terms of that relationship – this gap between the legal obligations in the Withdrawal Agreement and the contested political aspirations for the future has become controversial among UK Members of Parliament.

On the Labour Opposition benches (and certain elements of the Conservative backbenches), the concerns lie primarily with the way in which the Political Declaration reflects the Government's plan for a flexible partnership as set out in the Prime Minister's Chequers Plan. While Labour and some Conservative MPs might want a closer relationship – including a customs union and alignment with single market rules – even altered language in the Political Declaration would not change the non-binding nature of the commitments.

Within the Conservative Party and its Democratic Unionist Party partners in Government, it is the concern that the Irish backstop will trap the UK in a permanent customs union – with Northern Ireland additionally effectively remaining in the European Single Market – that remains the key stumbling block to MPs approving a Brexit deal. The backstop was conceived as a last resort option, with a hard border on the island of Ireland avoided EITHER through the overarching agreement on the future Union-UK relationship OR through a subsequent agreement to replace the backstop. But without greater security that the backstop 'safety net' would be avoided by future arrangements, attention has focused on re-opening the text of the legally-binding Withdrawal Agreement.

*Recognising that the Article 50 process establishes a legal path out of the Union with only a political path to a new future relationship, and acknowledging that this intensifies domestic political conflicts in the UK, an **"Implementation Protocol"** is proposed as a **legal bridge** between the texts of the Withdrawal Agreement and the Political Declaration.*

## The Proposal

The exchange of letters that took place in January 2019 between the UK Prime Minister and the presidents of the European Council and European Commission was an attempt to show that the texts of the Withdrawal Agreement and the Political Declaration were a connected package of commitments. Nonetheless, the initiative lacked credibility. The proposal for a legally-binding implementation protocol addresses that fundamental problem.

More concretely, the new Implementation Protocol would:

- Clarify the **inter-connected relationship** between the Withdrawal Agreement and the Political Declaration.
- Establish a **legal bridge** for implementing commitments made in the Withdrawal Agreement and Political Declaration during the transition period.
- Identify in a short single text key operational aspects relating to the negotiation of subsequent agreements and the roles assigned by the Withdrawal Agreement to the **Joint Committee**, including to monitor and review progress and to extend the transition period to facilitate negotiations, so avoiding the triggering of the Irish backstop.
- Create an **“assessment framework”** as an objective and agreed set of criteria to be used by the Joint Committee to review and bring to an end the Irish backstop were it ever to be deployed.
- Recall the possibility of the **provisional application** of subsequent agreements to ensure their application before the end of the transition period, so avoiding the triggering of the Irish backstop.
- Require the engagement of **parliamentary institutions** to ensure proper democratic scrutiny and oversight of the negotiations on the future relationship and de-risk the likelihood of parliamentary approval of the subsequent agreements being withheld.

The concept of an additional Protocol has been floated in academic circles and this proposal is a concrete initiative to set out what that could look like.<sup>1</sup> Depending on the interests of the respective parties, **the ambition for such a Protocol could be significantly greater** than that envisaged in the text which is annexed here.

Given the urgency of obtaining approval of texts, a more ambitious text has the risk of being more contentious and time-consuming to draw up and agree.

*Guided by these competing pressures, the approach set out here is one that seeks – in no more than five articles – to focus attention on the pledges and commitments that are made by the Union and the United Kingdom across the Withdrawal Agreement and the Political Declaration and to focus minds on what needs to happen **to implement those commitments** to take the Union and the United Kingdom forward to a future relationship based on new legal texts.*

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<sup>1</sup> See Holger Hestermeyer, ‘The Way Forward: Can a Protocol to the Withdrawal Agreement Save the Prime Minister’s Deal?’ <http://ukandeu.ac.uk/the-way-forward-can-a-protocol-to-the-withdrawal-agreement-save-the-prime-ministers-deal/>

Stijn Smismans, ‘Breaking the Brexit Deadlock: a binding Protocol to the Withdrawal Agreement might provide the answer’ <http://blogs.lse.ac.uk/brexit/2019/01/21/breaking-the-brexit-deadlock-a-binding-protocol-to-the-withdrawal-agreement-might-provide-the-answer/>

## Structure of the Proposed Implementation Protocol

The proposal for an implementation protocol has six elements:

- A Preamble that draws on existing texts to recall the political and legal context and to reinforce key commitments and pledges including the expeditious negotiation of subsequent agreements and the temporary nature of the Irish backstop.
- An Article that sets out the relationship between the Withdrawal Agreement and the Political Declaration.
- An Article elaborating the steps to implement the Withdrawal Agreement and the Political Declaration and certain key principles.
- An Article that gives greater clarity to what is expected of the Joint Committee in terms of its monitoring of progress towards subsequent agreements and creating an assessment framework for the review mechanism established by Article 20 of the Protocol on Ireland/Northern Ireland.
- An Article that highlights the capacity of agreed texts to have provisional application pending the finalisation of approval and ratification processes.
- An Article that pays close attention to parliamentary engagement throughout the negotiation of subsequent agreements.

### *Preamble*

The language replicates or draws on the precise language used in existing texts of the Withdrawal Agreement, the Political Declaration, the Protocol on Ireland/Northern Ireland, the letters of the presidents of the European Council and Commission as well as drafts of the Council Decisions to approve the texts.

*In one place and in one text it reminds all the parties of the pledges and commitments made and the context in which those commitments are made as well as the next steps in making good on those commitments.*

### *Article 1*

This opening article contains two key messages:

*The Withdrawal Agreement has to be interpreted in the context of the framework of the future relationship as set out in the Political Declaration;*

*Together these instruments create commitments which have to be implemented in the negotiations following the United Kingdom's withdrawal from the Union.*

By setting this out in a legally-binding Protocol, the non-binding Political Declaration is given legal effect through its implementation.

### *Article 2*

The ambition for the future relationship may evolve as the parties – in accordance with their own requirements – define their negotiation mandates. Any change in the UK's position on its ambitions would not therefore be inhibited by the framework for the future negotiations. A strong democratic message is also contained here namely that the implementation of the texts needs to ensure parliamentary engagement as set out in Article 5 of the Protocol and the outcomes must continue to respect and uphold the Belfast Agreement and the principle of consent.

### Article 3

This Article recognises the key role assigned to the Joint Committee structure in implementing the commitments made in the Withdrawal Agreement and the Political Declaration. These commitments include using “best endeavours” to reach subsequent agreements capable of being applied before the end of the transition period.

The key requirements are:

*The need to keep negotiations on track to avoid the triggering of the ‘backstop’ either through an overarching agreement on the future relationship or through an agreement on alternative arrangements;*

*The creation of an “assessment framework” to structure and facilitate the exercise of the review mechanism in Article 20 of the Protocol on Ireland/Northern Ireland with a view to ensuring that moves to end the backstop can be considered in an objective manner, thereby also facilitating any further dispute resolution processes;*

*The facility to extend the transition period informed by close monitoring of negotiations by the Joint Committee;*

*Full use of its powers to adopt decisions and recommendations to keep negotiations moving, to address risks and to push the parties to approve texts once they are drafted.*

These articles are indicative of what could be achieved through an implementation protocol. The focus is on processes rather than introducing new controversial and difficult-to-agree demands to change or re-open legal texts. However, the Union and the United Kingdom could agree to go further than what is proposed here. Moreover, this initiative runs in parallel with those that would seek changes to the Political Declaration.<sup>2</sup>

### Article 4

This acknowledges the capacity for subsequent agreements to be applied provisionally pending their formal approval and ratification. This is significant given that even an extended transition period might struggle to facilitate the full application of agreements that are subject to European and domestic parliamentary oversight and approval.

### Article 5

Recognising that the parliamentary difficulties in the United Kingdom have come late in the Article 50 TEU process it is imperative that relevant and respective parliamentary institutions are closely engaged in the process to implement the Withdrawal Agreement and Political Declaration through the negotiation of subsequent agreements.

The key requirements are:

*Parliamentary consultation in the formulation of negotiating mandates.*

*Parliamentary monitoring of negotiations.*

*A mechanism for adopting reasoned opinions as to any material risks to the capacity of parliamentary institutions to approve texts that have been drafted, thereby engaging the Joint Committee in resolving problems before texts are finalised and presented for approval.*

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<sup>2</sup> See Andrew Duff, ‘Brexit: The Compromise’, *European Policy Centre Discussion Paper* (14 February 2019), [http://www.epc.eu/documents/uploads/pub\\_9029\\_brexit\\_the\\_compromise.pdf?doc\\_id=2110](http://www.epc.eu/documents/uploads/pub_9029_brexit_the_compromise.pdf?doc_id=2110)

## The Text of the Implementation Protocol

### **Protocol on the Implementation of the Article 50 TEU Withdrawal Agreement and Political Declaration**

The Union and the United Kingdom,

RECALLING that, pursuant to Article 50(2) TEU, the Withdrawal Agreement shall be concluded between the Union and the United Kingdom ('the Parties'), taking into account the framework for their future cooperation,

NOTING that in parallel with the Withdrawal Agreement, the Parties have made a Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom,

AFFIRMING that the Withdrawal Agreement shall be interpreted in conjunction with the Political Declaration, which together establish commitments in respect of the negotiation of the future relationship,

DESIRING to clarify the implementation of the commitments and obligations created by these instruments through this Protocol,

RECALLING that consistent with its legal basis in Article 50 TEU and the commitments made by the Parties in Article 1(4) of the Protocol on Ireland/Northern Ireland, the Withdrawal Agreement – including the Protocol on Ireland/Northern Ireland – does not establish a permanent future relationship between the United Kingdom (or any constituent territory thereof) and the Union.

ACKNOWLEDGING that an agreement on a future relationship between the Parties can only be concluded once the United Kingdom has withdrawn from the Union,

RECALLING that the Political Declaration establishes the parameters of an ambitious, broad, deep and flexible partnership,

ACKNOWLEDGING that the flexibility of the partnership permits the Parties to agree a future relationship that evolves from that envisaged in the Political Declaration as the respective negotiating mandates of the Parties are determined or revised in accordance with their own procedures,

RECALLING that, pursuant to Article 184 of the Withdrawal Agreement, the Parties shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to begin negotiations as soon as possible after the United Kingdom's withdrawal from the Union,

RECALLING also that pursuant to Article 184 of the Withdrawal Agreement, the Parties commit to negotiate expeditiously the agreements governing their future relationship referred to in the Political Declaration and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the fullest extent possible, as from the end of the transition period (including any extension thereof in terms of Article 132 of this Agreement),

RECALLING further that in addition to the commitment made to use best

endeavours to negotiate and conclude agreements on their future relationship in line with the Political Declaration, Article 2 of the Protocol on Ireland and Northern Ireland also commits the Parties to using their best endeavours to conclude a subsequent agreement to supersede the Protocol on Ireland and Northern Ireland in whole or in part,

RECOGNISING that the expeditious negotiation and application of a subsequent agreement is a means of avoiding, as well as superseding, the application of provisions of the Protocol on Ireland and Northern Ireland,

RECALLING that Title 2 of Part VI of the Withdrawal Agreement establishes a Joint Committee that will continuously monitor the implementation and application of the Withdrawal Agreement when interpreted in conjunction with the Political Declaration,

DESIRING through this Protocol to identify ways in which the Joint Committee may facilitate the implementation of the Withdrawal Agreement in respect of the monitoring of progress towards the conclusion of subsequent agreements before the end of the transition period, including an agreement to supersede the provisions of the Protocol on Ireland/Northern Ireland,

NOTING that the Political Declaration identifies a forward process for the structure and format of the negotiation rounds – including parallel tracks – and for the scheduling and prioritisation of the work programme for negotiations in order to deliver on the commitments made by the Parties in this Agreement and the Political Declaration,

NOTING in particular that the forward process envisages that specific priority shall be given to negotiations related to the alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing as also stated in the Protocol on Ireland and Northern Ireland,

AFFIRMING that negotiations on the future relationship between the Parties shall respect the constitutional, institutional, political and legal identities of the Parties and that nothing shall be agreed between the Parties that is incompatible with those identities

AFFIRMING further that the cooperation between the Parties shall respect the roles assigned to parliaments in the scrutiny and oversight of negotiations and in approving the texts of any agreements entered into between the Parties,

RECALLING that pending formal approval and ratification an agreement or agreements between the Parties can have provisional application,

HAVE AGREED UPON the following provisions, which shall be annexed to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("Withdrawal Agreement"):



## ARTICLE 1

### *Relationship between the Withdrawal Agreement and the Political Declaration*

1. The Withdrawal Agreement is to be interpreted in conjunction with the Political Declaration on the future relationship between the Parties which has been negotiated in parallel.
2. The Withdrawal Agreement and the Political Declaration together establish commitments for the Parties for the negotiations following the United Kingdom's withdrawal from the Union. Without prejudice to the obligations of the Parties arising under the Withdrawal Agreement, the commitments established by the Withdrawal Agreement and the Political Declaration shall also be interpreted and applied in accordance with this Protocol.

## Article 2

### *Implementing the Withdrawal Agreement and the Framework for the Future Relationship*

1. The Parties shall negotiate in good faith agreements implementing the commitments made in the Withdrawal Agreement and the Political Declaration establishing a framework for their future relationship.

Upon the adoption of the Council Decision approving the text of the Withdrawal Agreement for signature, the Parties shall immediately begin the necessary preparatory work to define their negotiating mandates for the implementation of the Withdrawal Agreement and the Political Declaration.

2. Consistent with the flexible partnership envisaged by the Political Declaration, nothing in the Withdrawal Agreement or its Protocols shall prevent the Parties from evolving their ambitions for their future relationship when determining or revising their respective negotiating mandates for the conduct of the negotiations following the United Kingdom's withdrawal from the Union.
3. A subsequent agreement or agreements to implement the Withdrawal Agreement and the Political Declaration shall respect Article 5 of this Protocol.
4. Any agreement to implement the Withdrawal Agreement and the Political Declaration is without prejudice to the provisions of the 1998 Agreement regarding the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.

### Article 3

#### *The Joint Committee's Role in Implementing the Withdrawal Agreement and Political Declaration*

1. The Joint Committee established under the Withdrawal Agreement shall keep the progress of negotiations on the future relationship between the Parties under constant review, and make full use of its powers under Article 166 of the Withdrawal Agreement to address appropriate recommendations to the Parties' negotiators, including:

in respect of the prioritisation and organisation of the negotiations with a view to concluding agreements applicable before the end of the transition period (including any extension of the transition period in terms of Article 132 of the Withdrawal Agreement), and

in respect of the priority to be given to an agreement on alternative arrangements to ensure the absence of a hard border on the island of Ireland, consistent with Article 1(4) and 2(1) of the Protocol on Ireland/Northern Ireland.

2. Upon the entry into force of the Withdrawal Agreement, the Joint Committee shall initiate a process leading to the adoption of a decision of the Joint Committee establishing an assessment framework (the "assessment framework") to enable the review process established in Article 20 of the Protocol on Ireland/Northern Ireland to be implemented.

The decision referred to in this paragraph shall be adopted within nine months of the entry into force of the Withdrawal Agreement. In the event that a decision has not been adopted within this time, the Joint Committee, meeting at ministerial level, shall take all necessary steps to agree the decision referred to in this paragraph.

The assessment framework shall establish objective and verifiable criteria for the evaluation of a notification made under Article 20 of the Protocol on Ireland/Northern Ireland. Consistent with Article 1(3) of the Protocol on Ireland/Northern Ireland, the criteria shall relate to:

- The maintenance of North-South cooperation,
- The avoidance of a hard border,
- The protection of the all-island economy and
- The protection of the 1998 Agreement in all its dimensions

The Parties agree that a notification submitted in accordance with Article 20 of the Protocol in Ireland/Northern Ireland shall be assessed in accordance with the assessment framework. The evaluation of a subsequent agreement pursuant to Article 2 of the Protocol on Ireland/Northern Ireland shall also have regard to the assessment framework.

In accordance with Title III of the Withdrawal Agreement, a dispute arising from the assessment made by the Joint Committee pursuant to Article 20 of the Protocol on Ireland/Northern Ireland shall be subject to the procedures laid down in that Title.

The subject matter of a dispute referred to an arbitration panel pursuant to Article 170 of the Withdrawal Agreement may include disputes regarding the application of the assessment framework.

In respect of the period of time to comply with a ruling of an arbitration panel pursuant to Articles 175 and 176 of the Withdrawal Agreement, for the purposes of this paragraph, the Parties agree to undertake a revised assessment of a notification pursuant to Article 20 of the Protocol on Ireland/Northern Ireland in compliance with the ruling without delay, with the assessment to be completed no later than 90 days from the ruling of the arbitration panel.

3. No later than 29 March 2020, the Joint Committee shall report on the progress of negotiations. Should the Joint Committee identify any material risks to the ability to reach an agreement or agreements applicable before the end of the transition period, it shall adopt as appropriate recommendations or decisions to address those risks.
4. The Joint Committee shall make full use of its power under Article 132 of the Withdrawal Agreement and Article 3 of the Protocol on Ireland/Northern Ireland to extend the transition period for up to one or two years, including for the purposes of Article 2(1) of the Protocol on Ireland/Northern Ireland with a view to avoiding the application of the provisions of the Protocol on the ‘backstop’.
5. In the event that a draft of a subsequent agreement or agreements is reached between the Parties before the end of the transition period (including any extension thereof), the Joint Committee shall adopt a recommendation to the Union and the United Kingdom to initiate the procedures for the approval of the agreement or agreements in accordance with their respective constitutional and institutional requirements.

A recommendation adopted in terms of this paragraph may also include a recommendation for the purposes of Article 2 of the Protocol on Ireland/Northern Ireland, that aspects of that Protocol shall not apply or cease to apply in consequence of the agreement.

The procedure provided for in Article 5(3) of this Protocol shall be applied without delay to any recommendation adopted by the Joint Committee under this paragraph.

#### Article 4

##### *Provisional Application of Agreements*

Pending its entry into force, and compatible with the competence of the Union under the Treaties, an agreement within the scope of this Protocol – including an agreement on alternative arrangements to ensure the absence of a hard border on the island of Ireland, consistent with Article 1(4) and 2(1) of the Protocol on Ireland and Northern Ireland – may apply provisionally as from its date of signature, without prejudice to any procedure for its formal approval and ratification.

## Article 5

### *Parliamentary Engagement*

1. In defining their mandates for the negotiations of one or more agreements governing their future relationship, the Parties shall consult with their respective parliamentary institutions – in accordance with their own constitutional and institutional procedures – in determining the scope and ambition of their negotiations.
2. Throughout their negotiations the Parties shall keep their respective parliamentary institutions fully informed of the progress of negotiations and any material risks to the ability of the Parties to reach an agreement or agreements capable of being applied before the end of the transition period.
3. Where the Joint Committee adopts a decision or a recommendation – including a decision or a recommendation within the scope of this Protocol – it shall be transmitted to the respective parliamentary institutions of the Parties.

In respect of a recommendation falling within the scope of Article 3(5) of this Protocol, the respective parliamentary institutions of the Parties may address a reasoned opinion to the Joint Committee within six weeks of their receipt of such a recommendation identifying any material risks to the completion of parliamentary approval processes prior to the conclusion and ratification of a subsequent agreement.

In light of any issues brought to their attention by the parliamentary institutions, the Joint Committee, meeting at ministerial level, may adopt further decisions or recommendations with a view to finalising negotiations on the text of the agreement or agreements.

4. In accordance with their respective constitutional and institutional requirements, the United Kingdom and the Union shall engage their respective parliamentary institutions in the approval of any subsequent agreements. In the event that approval is not obtained, the Joint Committee shall meet to consider proposals for a recommendation or decision to address the situation.

## Acknowledgements

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## The Author

Kenneth Armstrong is Professor of European law at the University of Cambridge and a fellow of Sidney Sussex College. He is the author of [\*Brexit Time – Leaving the EU: Why, How and When?\* \(Cambridge University Press, 2017\)](#).

He tweets at @ProfKAArmstrong

He writes an occasional blog at [brexittime.com](http://brexittime.com).