

# Hostages to fortune: The unravelling of the Brexit prospectus

**Dr. Andrew Blick**

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## About the author

Dr Blick is Senior Lecturer in Politics and Contemporary History at King's College London, where he is also Director of the Centre for British Politics and Government. He is a Senior Research Fellow at the Federal Trust.

*'What is now being proposed won't be anything like what was promised two years ago.'*

*Hopes for "the easiest trade deal in history" have proved to be delusions. Contrary to promises, there is in fact no deal at all on our future trading relationship with the EU which the government can present to the country. Still less anything that offers the "exact same benefits" as the Single Market, as David Davis promised, or the "precise guarantees of frictionless trade" that the Prime Minister assured us would be available.'*

Jo Johnson statement on resigning as Minister of Transport, 9 November 2018<sup>1</sup>

Theresa May has now secured a draft exit agreement with the EU. Assuming it is approved by the EU 27 later in November, and that domestic political pressures in the UK do not force its abandonment, MPs in the House of Commons will then have the opportunity to approve or reject it. Even if for some reason the proposal collapses before a vote is held on it in the Chamber, MPs may be given – or else should insist upon – the right expressly to determine the way forward. How should they reach their decision when the time comes? If seeking evidence on which to base their decision, MPs may wish to take into account the extent to which developments to date have matched claims made on behalf of the Brexit project. If the case for leaving has demonstrably weakened, then the argument that Parliament should take steps to

halt this process or allow the referendum result of 2016 to be revisited is, as a corollary, enhanced. This paper discusses various aspects of the case for Brexit, made by senior politicians who have served as ministers and by the 'leave' campaign, that have been shown by subsequent events or realisations to be seriously flawed, or simply wrong. They are considered for the benefit of all MPs who, regardless of their previous position on the subject, will wish to take these developments into account.

These assertions fall into a number of categories, reflecting misconceptions, over optimism and errors of fact. Eight categories are mentioned here.

1. **Excessive optimism about what it would practically be possible to negotiate within the Article 50 timeframe, especially given the confused and unrealistic approach of the UK.**

The nominated lead campaign group for 'leave' in the referendum, Vote Leave, issued a statement on its website on 15 June 2016 entitled 'A framework for taking back control and establishing a new UK-EU deal after 23 June'.<sup>2</sup> The text claimed that '[i]t will be possible to negotiate a new settlement with the EU, including a UK-EU free trade deal, by the next general election in May 2020.' Aside from the matter of the next General Election coming sooner than anticipated (in June 2017), while this statement has not yet definitively been proven wrong, it would certainly appear foolishly optimistic at this point to

<sup>2</sup> <http://www.voteleavetakecontrol.org/a-framework-for-taking-back-control-and-establishing-a-new-uk-eu-deal-after-23-june.html> .

<sup>1</sup> <https://medium.com/@JoJohnsonUK/why-i-cannot-support-the-governments-proposed-brexit-deal-3d289f95f2bc>

assume that an FTA will be settled by May 2020.

Following the referendum, the UK government, having adopted a policy of leaving, continued such misguided claims. On 14 December 2016, David Davis, Secretary of State for Exiting the European Union, attended an oral evidence session with the House of Commons Exiting the European Union Committee. He discussed the deal he thought he could obtain from the EU, stating that 'we want to get the maximum market access for British companies with the minimum of disruption' (Q409). Discussion turned to the 2-year timeline set out by Article 50, once triggered. A working assumption was that the actual details would need to be agreed six months in advance of the final deadline, to secure the necessary political approval (the six-month mark had been crossed before a draft deal was attained in mid-November 2018). The committee chair, Hilary Benn, asked: '[w]hat if all those things cannot be negotiated within the time – it could be 18 months, depending on what view is taken?' Davis insisted that 'Mr Barnier said 18 months and I think that it is all negotiable in that time... We are aiming to get ourselves into a position where we can negotiate within the article 50 process. After all, the article 50 process was written to allow departure from the European Union. That is its purpose and plainly the architects of it – the authors of it – thought that it was time enough to do the job, and so do I.' (Q410).

Various problems arise from this statement. Davis appeared to be insisting that not only could exit terms be agreed, but at least a firm idea about the form that an EU-UK FTA would take, by the end of September 2018. By the time this date was reached, Davis had resigned from Cabinet, and neither was in place. While a draft exit agreement has now been achieved, the FTA remains largely a matter of uncertainty. Admittedly, Davis was making a claim about what could be achieved, not what definitely would. However, even if the agreements to which he referred were attainable on this schedule, it was the incoherent and unrealistic UK approach, to which Davis was a principal contributor, that prevented this accomplishment.

It is notable that Davis should refer to 'the authors of' Article 50. The main drafter of this provision, Lord (John) Kerr, in an article published on 28 July 2018, wrote that: '[n]o one imagined a member state starting the negotiations clock before deciding on a negotiating position or delaying for over 15 months before seeking cabinet consensus on what kind of future relationship it sought. Don't blame the treaty: the time pressure we're now under is entirely of our own making.'<sup>3</sup> The actions

<sup>3</sup> <https://www.theguardian.com/commentisfree/2018/jul/28/brexit-car-crash-only-britain-can-save-itself>

to which Davis and the UK government as a whole were party meant that his confidence about timing was mis-founded. Moreover, while Kerr might have regarded the two-year period for which Article 50 allowed as reasonable, it is important to emphasise that when he drafted what became this Article, he did not have the UK in mind. Kerr has stated that he originally envisaged a scenario in which an authoritarian government had taken power in a member state, had its membership of the EU suspended, and would then be able to leave within the terms of the provision he devised.<sup>4</sup>

Another optimist regarding what could be achieved within the time limit imposed by Article 50 has been Liam Fox, the Secretary of State for International Trade. On 20 July 2017, he told the Today Programme that: '[t]he free trade agreement that we will have to do with the European Union should be one of the easiest in human history'.<sup>5</sup> He now appears to have been disabused by events. On 6 November 2018, Fox was reported as saying at a press conference that it was 'impossible' to say whether the UK could secure any kind of deal with the EU over the coming two months.<sup>6</sup> On 10 November he told the media that no detailed discussion at all had begun on the subject of an EU-UK FTA.<sup>7</sup> While there is now a draft agreement for MPs to vote on, it is not the combined exit deal and FTA that they were told would be on offer. While exit arrangements have been dealt with in detail in a 585 page text, at present the proposed FTA is set out in vague terms in an accompanying 7-page political declaration. When making their judgement in such a circumstance, the Commons should consider not only the merits of what is being presented to them, but that it is far less extensive in its scope than what was previously said to be easily attainable. The pledge that Theresa May made on 8 October 2018 that 'there can be no withdrawal agreement without a precise future framework' is set to go unfulfilled.<sup>8</sup>

2. **Misunderstanding of the legal position surrounding the exit process, including what could be discussed with the EU in advance of triggering Article 50; and the potential for negotiating new FTAs before the UK had left the EU.**

Alongside a failure to comprehend the practical limita-

<sup>4</sup> <https://www.independent.co.uk/news/uk/politics/article-50-design-dictators-not-uk-eu-european-treaty-author-lord-kerr-a7655891.html>

<sup>5</sup> <https://www.theguardian.com/politics/2017/jul/20/liam-fox-uk-eu-trade-deal-after-brexit-easiest-human-history>

<sup>6</sup> <http://www.cityam.com/268472/trade-minister-liam-fox-says-impossible-say-whether-brexit>

<sup>7</sup> <https://www.standard.co.uk/news/politics/brexit-news-latest-uk-may-not-get-withdrawal-deal-with-eu-trade-minister-liam-fox-admits-a3986521.html>

<sup>8</sup> <https://www.businesstelegraph.co.uk/may-seeks-frictionless-trade-in-return-for-border-deal/>

tions, the Brexit programme has suffered from a misunderstanding of the legal constraints imposed by the Article 50 process. It was soon exposed. A lack of awareness in this area was suggested by an assertion in the 15 June Vote Leave statement that:

*'Article 50 is not the sole lawful means of leaving the EU. If this were the case, Greenland could not have left the EU in 1985, but it did. Greenland left under what is now the 'ordinary revision procedure', or article 48 of the Treaty on European Union'.*

Given that Article 50 did not exist at the time that Greenland left what was then the European Community, this line of argument was dubious. Other informed opinion had already held that Article 50 was the only clearly legal means of bringing about departure from the EU<sup>9</sup>; and activation of the Article was the course of action followed by the UK Cabinet in March 2017, which included within it affiliates of Vote Leave. Indeed, supporters of Brexit were outraged when the UK judiciary ruled in the Miller case that the government did not have the power under the Royal Prerogative to initiate the Article 50 procedure, and that it must seek further specific authorisation to do so through an Act of Parliament.

As well as making problematic assertions about the means by which the UK might depart from the EU, Vote Leave advanced claims about the rules to which it would be subject during such a process that have since proved erroneous. The 15 June statement insisted that:

*'If we vote to Leave, then Parliament could then enact the following legislation:*

*European Union Law (Emergency Provisions) Bill. This would be introduced in the current session of Parliament. It would immediately end the rogue European Court of Justice's control over national security, allow the Government to remove EU citizens whose presence is not conducive to the public good (including terrorists and serious criminals), end the growing use of the EU's Charter of Fundamental Rights to overrule UK law, and end payouts under EU law to big businesses, saving between £7 billion and £43 billion for public services by 2021. This will amend the European Communities Act 1972 but not repeal it. This action is limited to areas that will not form part of the final UK-EU settlement.'*

<sup>9</sup> See the House of Lords European Union Committee report of 4 May 2016 on 'The Process of Withdrawing from the European Union', p.5 < <https://publications.parliament.uk/pa/ld201516/ldselect/ldcom/138/138.pdf> >

No such legislation has appeared. Nor could it have been passed without thoroughly compromising UK exit negotiations with the EU and without severe consequences for perceptions of the UK, promoting the view that it was a state that does not fulfil its prior international commitments. The UK remains a full member of the EU, subject to the jurisdiction of the Court and European law, at least until the end of March 2019. The terms of the transitional phase projected to follow UK departure will prohibit such action.

A major legal flaw that has been exposed in the leave prospectus is the idea that the UK would be free to negotiate free trade agreements with third parties before it had exited the EU. In a speech of 4 February 2016<sup>10</sup>, Davis explained that:

*At the same time these negotiations [with the EU] are going on Britain will need to undertake a massive programme of simultaneous negotiations to negotiate free trade agreements with target countries that will be key to a more global approach.*

While the UK might have needed to carry out such project, it was not allowed to. For as long as it is a member of the EU, the UK cannot negotiate its own trade agreements with other states, since they are a matter handled at EU level. Further evidence of failure – willful or otherwise – to comprehend the legal and practical realities that Brexit would engender was exhibited in the 15 June 2016 Vote Leave text through the statement that:

*'After we Vote Leave, we would immediately be able to start negotiating new trade deals with emerging economies and the world's biggest economies (the US, China and Japan, as well as Canada, Australia, South Korea, New Zealand, and so on), which could enter into force immediately after the UK leaves the EU.'*

Such negotiations could not possibly lawfully and formally begin before Brexit was complete, as has become apparent; and even if they could have, it is stretching plausibility to suppose that any of them could have become active in time for UK exit from the EU, unless that date was postponed to an extent that would have been unacceptable to supporters of departure within the UK (and probably unpalatable to the EU as well).

3. A misunderstanding of the relative bargaining positions of the UK and EU and of how the prospect of Brexit would be received within the other EU member states.

<sup>10</sup> <https://www.conservativehome.com/platform/2016/02/david-davis-britain-would-be-better-off-out-of-the-eu-and-heres-why.html>

Advocacy of leaving has been founded in an overestimation of the importance of the UK to the EU relative to its desire to preserve the coherence of its organisation. Davis's 4 February 2016 speech included the following passages:<sup>11</sup>

*'We are too valuable a market for Europe to shut off. Within minutes of a vote for Brexit the CEO's of Mercedes, BMW, VW and Audi will be knocking down Chancellor Merkel's door demanding that there be no barriers to German access to the British market.*

*And while they are at it they will be demanding that those British companies that they own will have uninterrupted access to Europe...*

*And this is not just German cars. The same will happen with Shell and Unilever in the Netherlands, EDF, EADS and the viticultural trade associations in France, Seat in Spain, and Fiat and the fashion designers in Italy.*

*The pressure from European companies for a free trade deal between the UK and the remaining member [sic] of the European Union would be huge.'*

Following the referendum, there was no evidence of the immediate appearance of this kind of internal pressure within EU member states to provide the UK with a preferential deal. Davis went on to state that:

*'We have far more to gain than we have to lose, while the opposite is true for the EU...*

*Access to our market is more important to Europe than our access to theirs.'*

This claim about the relative importance of the EU and UK markets is difficult to sustain. To date, negotiations between the EU and UK have involved the latter resisting then ultimately capitulating to the broad position of the former: suggesting the opposite balance to that proposed by Davis. Indeed, there has been substantial lobbying, in public and seemingly in private, from UK businesses (in as far as commercial interests have a definite home country) seeking to soften the UK approach towards

Brexit and maximise regulatory and customs continuity.<sup>12</sup>

Another overestimation of the bargaining strength of the UK came in July 2017. When speaking in the House of Commons, Boris Johnson, then Foreign Secretary, proposed that the EU should 'go whistle'.<sup>13</sup> He appeared to be precluding the possibility of a financial exit settlement by the UK on a scale to which the government of which he was a part in principle assented in December of that year. Such an arrangement is now contained in the draft withdrawal agreement.

4. **An erroneous view that the EU would fail to maintain a single outward position, and that the UK could deal directly with individual member states**

Davis issued a series of tweets on 26 May 2016, that attained retrospective notoriety as they came to appear increasingly less accurate. The most well-known was his statement that:

*'The first calling point of the UK's negotiator immediately after #Brexit will not be Brussels, it will be Berlin, to strike a deal'<sup>14</sup>*

That the UK might 'strike a deal' directly with Germany proved to be an untenable proposition. Indeed, Davis himself, as the minister with senior responsibility for Brexit, carried out his negotiations with the EU at Brussels. This tweet and the others Davis made that day came from a speech he gave at the time entitled 'The Economic Case for Brexit'.<sup>15</sup> In it, alongside his assertion about Berlin, he made a variety of claims, including that:

*'Similar deals would be reached with other key EU nations. France would want to protect the £3bn of food and wine it exports to the UK. We have seen the sort of political pressure French farmers are willing to bring to bear when their livelihoods are threatened, and France will also be holding a general election in 2017.'*

The French elections that Davis hoped would assist his cause returned to office a President and Parliament committed to European integration, rather than

<sup>12</sup> See eg: <https://www.economist.com/britain/2018/06/28/hard-brex-it-is-unravelling>

<sup>13</sup> <https://www.theguardian.com/politics/2017/jul/11/european-leaders-can-go-whistle-over-eu-divorce-bill-says-boris-johnson>

<sup>14</sup> <https://twitter.com/daviddavismp/status/735770073822961664?lang=en>

<sup>15</sup> 'The Economic Case for Brexit' – 26 May 2016 – One Great George Street <http://www.daviddavismp.com/david-davis-gives-a-speech-making-the-case-for-brexit/>

<sup>11</sup> <https://www.conservativehome.com/platform/2016/02/david-davis-britain-would-be-better-off-out-of-the-eu-and-heres-why.html>

facilitating its collapse through allowing the UK to bypass the fundamental rules of the EU. Davis went on:

*'Italy will deal to protect its billion-pound fashion exports. And Poland its multi-billion pound manufacturing and electronics exports.'*

Davis concluded 'there is almost certainly going to be a deal, one that maintains a free market between the EU and the UK.' This statement seemed to imply that he envisaged a single agreement, rather than a series of deals, as the earlier passages of the speech suggested. In this sense, the Brexit programme was a compound of inaccuracy and confusion. In the unlikely circumstance in which the UK achieved a series of bilateral FTAs with individual European states, there would be no more integrated single European market with which to trade. The reality has been that the EU has proved, to date, effective at remaining a united front in a way that pro-Brexit narratives did not suggest a group comprising 27 different states could. By contrast, and notwithstanding its supposed tradition of collective responsibility within government, the single, departing member state has failed to achieve this degree of solidarity, with members of the UK Cabinet frequently and publicly avowing different approaches. That the unified EU approach might come as a surprise within the UK arises from a too-commonly held perception of the EU in this country. The continental integration project is construed as at best an inconvenient vehicle for the pursuit of narrow self-interest. This outlook differs significantly from the prevailing perceptions in many other member states. While they all have their own distinct agendas, they also regard these objectives as compatible with and supported by a wider European consciousness.

MPs voting on the way forward may wish to take into account that the case for Brexit expressly rejected the now manifest resilience of the EU as a collective entity in its dealings with the outside. This realisation points to an underlying difficulty with many arguments offered in favour of leaving: that they serve primarily the convenience of the moment, rather than being a serious basis for action. In previous Eurosceptic narratives the EU has at times been less likely to be represented as an unstable entity ready to fragment and take conflicting internal lines in order to please the UK. Rather it was denigrated as acting on the instructions of a dominant bloc of countries, often said to centre on France and Germany, the objective of which was to exploit the UK. In a curious way, the Brexit project has turned this dubious claim into a reality. It has wilfully manoeuvred

the UK into an antagonistic relationship with the EU and many of its member states, leaving them with little option but collectively to force the UK to accept the inevitably damaging consequences of its decision to leave the EU.

##### 5. Misconception of the nature of the four freedoms, and the willingness of the EU to detach them.

An important element to the Brexit programme that has now become difficult to sustain is the idea that the UK could 'cherry-pick' those aspects of EU membership it found attractive – such as access to the single market – while rejecting those it did not, in particular the free movement of people. On 30 September 2016, for instance, Johnson was reported in the Sun stating that 'Our policy is having our cake and eating it.'<sup>16</sup> The comment seems to have been made in the context of a pledge to, as the Sun put it 'get immigration controls back as well as continuing open trade with the EU.' Free movement of people are one of four freedoms – the others being free movement of capital, goods and services – that are part of the essence of the EU. Their continuation and indivisibility are fundamental to the continental integration project. Without them the Single Market would not function. Comments such as that made by Johnson suggest either ignorance of their existence, or an underestimation of the premium that the EU places upon them. Whatever their foundation, such outlooks have been exposed as mistaken. The EU has shown no signs of being willing to countenance allowing the UK to take an approach that would substantially compromise the four freedoms. The next type of assertion that has subsequently been undermined is essentially a variant on the 'cherry picking' fallacy:

##### 6. A belief that the UK could adopt its own regulatory policies, distinct from those of the UK, without negative consequences for its trading relationship with the EU.

In a 4 February 2016 speech<sup>17</sup>, for instance, Davis suggested that under a future arrangement: 'We would be free to reduce our regulatory burden, making our businesses more competitive.' Were the UK to insist on using regulatory flexibility to secure competitive advantage over the EU, the EU would regard such activity as the creation of the type of non-tariff barrier that the Single Market was designed to counteract. The EU has shown no signs in the period since Brexit

<sup>16</sup> <https://www.thesun.co.uk/news/1889723/boris-johnson-joins-forces-with-liam-fox-and-declares-support-for-hard-brexit-which-will-liberate-britain-to-champion-free-trade/>

<sup>17</sup> <https://www.conservativehome.com/platform/2016/02/david-davis-britain-would-be-better-off-out-of-the-eu-and-heres-why.html>

became the policy of the UK government of accepting such a position. If the UK sought to exploit regulatory divergence to the advantage of domestic interests, there would be negative consequences for UK access to the single market. Any other response from the EU, as discussed above, would entail the capitulation of fundamental principles of the EU, endangering its future cohesion. A further manifestation of the cherry-picking or 'cake' fantasy has been:

7. An apparent view that the UK could pursue distinctive tariff policies with third parties while being able to trade freely with the EU.

In the same 4 February 2016 speech<sup>18</sup>, in discussing 'the absolute benefits that Britain would gain', Davis insisted that 'Our food imports would be cheaper outside of the common external tariff... We would be able to negotiate our own trade deals, opening up new markets...' Were the UK to pursue its own distinctive policies in this manner, the UK would be – as Davis correctly put it – 'outside of the common external tariff'. Its exports to the EU would, unless the Customs Union was to become seriously compromised, be subject to tariffs, reducing the extent of access for the UK. The EU has remained firm on this point. On 24 January 2017, Davis told the Commons that it would be possible to secure a:

*'a comprehensive free trade agreement and a comprehensive customs agreement that will deliver the exact same benefits as we have, but also enable my right hon. Friend the Secretary of State for International Trade to go and form trade deals with the rest of the world, which is the real upside of leaving the European Union.'*<sup>19</sup>

But when pressed about the 'exact same benefits' claim on the Today Programme on 30 March 2017, Davis appeared already to be distancing himself from it, stating that:

*'I make no apology for being ambitious about what we're trying to do.'*

*The classical approach for a politician during a negotiation is to reduce expectations... that's what people think is the "sophisticated" way. We are playing for the national interest here I'm going to aim as high as conceivably possible.'*<sup>20</sup>

8. A failure to appreciate the nature of FTAs available to states outside the EU, and consequently the extent to which they could offer an effective replacement for participation in the European Single Market and Customs Union.

Davis promoted a further claim that is now difficult to maintain in his 4 February 2016 speech. He described his view of an EU-UK FTA in the following terms:

*The Swiss option, EFTA membership plus a host of bilateral treaties, is the best starting place and is informative in many ways...*

*The optimum aim for us would be similar, but without the free movement of peoples. That would not be on the table. Essentially we would be looking for a full scale free trade agreement. And it has just been done by another country.*

*If you want a model of how this would look, go on the European Commission website and look at the Canadian Comprehensive Economic and Trade Agreement that the EU has just struck...'*

With these words Davis provided an exemplar of the 'cherry picking' approach to Brexit. Like Johnson, with his reference to the exclusion of freedom of movement, he appeared to be overlooking the four freedoms concept. But the EU or its constituent member states did not simply offer to abrogate their principles after 23 June 2016 as Davis stated they would. Furthermore, his speech suggested confusion over the differences between the Swiss relationship with the EU and the EU FTA with Canada; and also a mistaken belief that either arrangement, however it might be enhanced, could provide market access to replicate the commercial advantages provided by EU membership. Davis seemed to regard the Canadian arrangement, which represents less integration with the EU than that between Switzerland and the EU, as nonetheless potentially providing for an enhancement of the Swiss deal. Neither Switzerland nor Canada have the degree of incorporation with the EU provided by actual membership of the organisation, which the UK is currently in the process of abandoning.

To conclude, the preceding pages have shown that many key claims regarding the supposed value of UK

<sup>18</sup> <https://www.conservativehome.com/platform/2016/02/david-davis-britain-would-be-better-off-out-of-the-eu-and-heres-why.html>

<sup>19</sup> <https://hansard.parliament.uk/commons/2017-01-24/debates/d423aee6-be36-4935-ad6a-5ca316582a9c/article50>

<sup>20</sup> <https://www.independent.co.uk/news/uk/politics/brexit-david-davis-exact-same-benefits-promise-article-50-theresa-may-a7657426.html>

departure from the EU have been seriously or fatally undermined. Even now, some Brexit advocates continue to advance such perceptions, seemingly unaware of or unwilling to accept evidence to the contrary. But the case for allowing the UK to revisit the policy of exit from the EU, can only be strengthened by the diminished credibility of the Brexit prospectus. Some might hold that false or unrealistic claims have been made by supporters of remaining also. They are probably correct. But at present, the policy being pursued is that of leaving. Given the radical, difficult-to-undo change it entails, it is proper that claims made on behalf of Brexit be thoroughly scrutinised. If they are found to be deficient, then – it might reasonably be concluded – so is the policy itself, as well as the basis on which it was adopted. In its place, Brexit – as Jo Johnson, whose resignation statement is quoted at the head of this paper, observed – takes on two possible forms. One variant entails a maximum level of disruption seemingly attractive only to ideologues or those actively hostile to the interests of the UK and the EU region. The other, more appealing only by default, is that plausibly referred to as “vassalage.” It involves maintaining the responsibilities of membership, while losing some of the key benefits. The Commons has a duty to consider whether another approach would be preferable, even if to do is to question the supposed irreversibility of the decision to leave the EU.