

The Irish border issue is not going away, no matter how much the UK government may wish it away



*The European Commission's Draft Legal Text on UK Withdrawal from the EU has kept closely to the [European Commission-UK's Joint Statement](#) of December 8th. There are, however, some differences which signal the EU's growing impatience with the Brexit negotiations, observes **Etain Tannam (Trinity College Dublin)**. Some of these differences could become bargaining chips to facilitate agreement with the DUP. Ultimately, one thing is for sure: the Irish border issue is not going away, no matter how much UK government may wish it away, she concludes.*

The freshly unveiled Draft Legal Text on UK Withdrawal from the EU includes under its Protocol on Ireland/Northern Ireland the so-called 'back-stop' option that if the UK cannot, or will not come up with an alternative satisfactory option, for example, remaining in the Customs Union and/or Single Market, the provisions of the Ireland/Northern Ireland protocol will apply. By providing the back-stop option, it not only seeks to protect a soft Irish border and the Good Friday Agreement as a default, it makes it clear that if the UK government does not agree to a Custom Union and/or Single Market arrangement with the EU, or present a satisfactory alternative that protects a soft border, the protocol is the only option. Arguably, it seeks to incentivise the UK government to opt for a soft Brexit for all of the UK.

Irish government ministers and the Taoiseach have welcomed the European Commission's text and emphasised that it simply puts into legal text the agreement between the UK government and the EU in the December 8th joint statement. In most ways, this is true and [Theresa May's](#) response smacked of internal Tory politics and the need to maintain DUP support for the government. Indeed, not surprisingly, Arlene Foster reacted with similar intensity, tweeting:

EU draft text is constitutionally unacceptable & would be economically catastrophic for Northern Ireland. I welcome the Prime Minister's commitment that HMG will not allow any new border in the Irish Sea. Northern Ireland must have unfettered access to GB market. AF

— Arlene Foster (@DUPleader) [February 28, 2018](#)

These responses are not entirely surprising, given the DUP's begrudging last-minute acceptance of the December joint statement and Theresa May's weak and divided government. However, there are also four key differences between the December 8 statement and the February text:

- In the February text, specific areas are stated explicitly as being subject to common regulation on the island, as a back-stop solution: 'This Protocol is based on the third scenario of maintaining full alignment with those rules of the Union's internal market and the customs union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement, and that it applies unless and until an alternative arrangement implementing another scenario is agreed' (Protocol on Ireland/Northern Ireland). The text in subsequent articles (5-8) specifies agriculture and fisheries, the single electricity market on the island (also mentioned in the UK government's position paper on Northern Ireland), environment, and other areas of cross-border cooperation – transport, education, tourism, telecommunications, broadcasting, inland fisheries, justice and security, higher education, and sport. These are the sectors that are deemed central to the cross-border arrangements of the Good Friday Agreement. The December statement refers more generally to areas necessary for cross-border cooperation and the Good Friday Agreement. Similarly, the February text is more specific about the future of cross-border cooperation, by stating in a separate paragraph from references to the UK's commitment to East-West and cross-border cooperation, that the aim is to 'support current and future common policies and approaches between Ireland and Northern Ireland in accordance with 1998 Agreement'. The December statement says that 'the United Kingdom remains committed to protecting and supporting continued North-South and East-West cooperation' and there is no reference to future common policies and approaches between Ireland and Northern Ireland.
- The Joint Statement on December 8th, following DUP influence, stated that the UK respected/guaranteed Northern Ireland's constitutional status in the UK. The February text uses less blunt language by recognising 'the need to respect the provisions of the 1998 Agreement regarding the constitutional status of Northern

Ireland and the principle of consent' (Protocol, paragraph 98).

- The December joint statement states that Northern Ireland business 'unfettered access' to the UK market will be protected, (implying no sea border) but the February text does not include this statement.
- The December statement includes a commitment to the continuation of EU funding programmes to Northern Ireland and Ireland: Peace and Interreg programmes, but the February text does not mention this commitment.

Other language in the February text echoes language used in the past 15 months, for example in Theresa May's 2016 Florence [speech](#) and in previous statements by the Irish government and by EU-there are references to 'unique' challenges faced and the commitment that there will be no 'physical infrastructure' on the border.



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To sum, although the February text is almost identical to the December joint statement, there are some differences. However, these differences have not been referenced publicly in the UK government's immediate response to the text. In fact, Theresa May's reaction has been to state that there can be no separate regulatory system from the rest of the UK – the very thing that had actually been agreed in the December statement. There has been no allusion to the above differences.

What is the significance of these differences? Arguably, the draft legal text makes clear yet again that the Irish border issue cannot be cast aside. It delivers a message that the EU has grown impatient of the UK government's mismanagement of the Brexit negotiations. The text implies that it is up to the UK government to come up with more favourable and agreeable options if it wants to avoid the Ireland/Northern Ireland border protocol. In this sense the protocol is a stick to entice a soft border, but it is more than that, because it has credibility and it reflects the EU's and the Irish government's commitment to protecting the soft border and Good Friday Agreement in their own right.

The differences from the December text may well strengthen that approach and emphasise, for example, that under the back-stop protocol, Northern Irish businesses cannot have unfettered trade with the UK, as a border between Britain and the island of Ireland will be necessary. The only alternative is for the UK to remain in the Customs Union and/or Single Market. Secondly, another explanation is that the above differences between the December and February texts may allow for bargaining, so that the EU can provide incentives later to allow the DUP reach agreement. So, just as was the case on December 8th, when the UK's commitment to the constitutional status of Northern Ireland was included at the last minute, to enable DUP acceptance of the draft, some textual tweaking and financial incentives may enable DUP support.

One thing is for sure: the Irish border issue is not going away, no matter how much some UK government members may wish it away.

This article gives the views of the author, and not the position of the LSE Brexit blog, nor of the London School of Economics.

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