Institute for Public Policy Research

BRIEFING

A LEVEL PLAYING FIELD FOR WORKERS

THE FUTURE OF EMPLOYMENT RIGHTS POST-BREXIT

Marley Morris

October 2018

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This briefing paper was first published in October 2018.

The progressive policy think tank

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ACKNOWLEDGEMENTS

I would like to thank the Barrow Cadbury Trust and Leigh Day for their generous support, without which this report would not have been possible. My thanks also go to Catherine Barnard, Shubha Banerjee and Hannah Reed for their comments on earlier drafts of this report, as well as Sam Lowe, Swee-Leng Harris, Neil Foster, and Kathleen Walkershaw for conversations about the research. I am grateful to all participants at a roundtable on this issue at IPPR over the summer.

At IPPR, my thanks go to Paulius Mackela for his early research on the report; to Kate Henry for helping with the editing process; and to Phoebe Griffith, Joe Dromey and Tom Kibasi for their feedback on earlier drafts. I would also like to thank Abi Hynes and Richard Maclean for their work on the design, copy-editing and publication of the report. All errors and omissions remain my own.

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Citation
If you are using this document in your own writing, our preferred citation is:
Morris M (2018) *A level playing field for workers: The future of employment rights post-Brexit*, IPPR.
http://www.ippr.org/research/publications/a-level-playing-field-for-workers

SUMMARY

As part of the post-Brexit future relationship between the UK and the EU, both parties are expected to negotiate an agreement on upholding employment protections. This will comprise part of a 'level playing field' for future trade.

Both sides of the negotiations have their own reasons for negotiating an agreement on employment protections. In the EU, there are fears that without common minimum standards the UK will be tempted to deregulate its employment legislation in order to gain a competitive advantage over EU member states. In the UK, there is a broad public consensus about the importance of protecting EU-derived employment rights after Brexit, and the government wants to agree employment provisions as part of its wider plans for an ambitious UK-EU relationship.

This paper explores how to guarantee a 'level playing field' for employment protections. There are three main considerations. First, there is the question of the **scope** of employment protections included in the agreement: are all employment rights covered, or simply a subset? Second, there is the question of **governance**: how best can the agreement on employment rights be enforced and how should disputes be resolved? Third, there is the question of **future legislation**: to what extent should the agreement be updated over time as EU legislation on employment rights develops?

Both the UK and the EU have suggested that the future relationship can guarantee a common baseline for employment protections through a non-regression clause. This is a provision that stipulates that neither party will drop their labour standards below current levels. However, typically non-regression clauses are problematic on three fronts. First, the scope of the non-regression clause is limited to the extent that a breach would only take place in instances where deregulation can be proved to encourage trade and investment. Second, the non-regression clause has weak governance arrangements: enforcement is largely left up to domestic authorities, and dispute resolution is managed through consultation and a 'panel of experts' that can only issue non-binding resolutions. Third, a non-regression clause, by definition, does not take into account future legislation on employment protections developed by the EU after Brexit.

The UK and the EU have suggested that they recognise the limits of a typical non-regression approach and have indicated they are willing to go further. This could be delivered through an 'enhanced' non-regression clause. An 'enhanced' provision could expand the scope of the clause so that it applies in all circumstances, not simply when loosening employment standards encourages trade and investment. Moreover, in order to avoid ambiguity, it could include a list of specific EU-derived employment legislation which the UK and the EU commit to maintaining.

An 'enhanced' non-regression clause could also have stronger governance arrangements. There are three main options for improving governance. First, the clause could be governed via an ad hoc arbitration panel, which would manage disputes between the two parties. The arbitration panel would be able to issue binding decisions and impose sanctions (eg financial penalties) and therefore would have more 'teeth' than a normal 'panel of experts'.

Second, it could include a third-party referral mechanism, in order to allow individuals, trade unions and other stakeholders to make complaints to an independent body. The body would then be able to raise the matter to both

parties and potentially trigger the formation of an arbitration panel, which would discuss the issue. A mechanism of this sort would allow individuals to more easily enforce their own rights.

Third, the agreement on employment protections could be governed by a supranational court. This court could be modelled on the EFTA court, which governs the EEA Agreement for the EEA EFTA countries (Norway, Iceland and Liechtenstein). The court would be a permanent body made up of representatives selected by the UK and the EU, as well as potentially a third party, and would have jurisdiction over only the UK. It would interpret EU-derived employment legislation in line with the case law of the Court of Justice of the European Union. A parallel independent Supervision Authority would monitor the UK's enforcement and would have the power to bring cases to the court, including as a result of individual complaints. Where states do not properly implement relevant legislation, individuals who lose out as a result could claim compensation. This arrangement would guarantee the most robust governance procedures, because it would allow individual enforcement of rights, consistency and transparency of decision-making, and proportionate sanctions for non-compliance.

An 'enhanced' non-regression clause could therefore strengthen the scope and governance arrangements of the agreement on employment protections in various ways. However, by definition it would not account for future legislation, because it only pertains to parties retreating on prior employment protections. For this, a 'common rulebook' approach is needed. This would align the UK's and the EU's employment protections now and in future. Under a 'common rulebook' approach, the agreement would contain a mechanism for updating itself as EU legislation on employment protections developed. This could be an automatic process, or it could allow for a process of consultation in a joint UK-EU committee, where the UK could decide to diverge from EU employment legislation at the cost of losing a proportionate level of market access.

We summarise the main options for the UK and the EU below.

TABLE 0.1

Options for a UK-EU 'level playing field' on employment protections post-Brexit

Options	How wide is the scope?	How robust is the governance?	How is future legislation treated?
Option 1: standard non-regression clause	Limited to where lowering of employment standards encourages trade and investment	Very weak: enforced domestically and dispute resolution managed through consultations; as a last resort a 'Panel of Experts' can issue non-binding recommendations	No updating of agreement in line with future legislation
Option 2: 'enhanced' non-regression clause	Wider scope via: (i) outcomes-based approach (based on impacts of deregulation on trade and investment, rather than intentions of deregulation) (ii) including all instances of lowering employment standards, not simply where it impacts on trade and investment (iii) list-based approach where relevant EU-derived employment legislation is listed in an annex to the agreement	Stronger governance procedures via: (i) ad hoc arbitration panel that can make binding decisions and issue sanctions (ii) third party referral system to allow individuals, trade unions and other interested parties to make complaints about the enforcement of the agreement (iii) a supranational court that interprets the agreement in line with the CJEU	No updating of agreement in line with future legislation

Option 3: 'common rulebook'	Wide scope: typically through a list-based approach where relevant EU-derived employment legislation is listed in an annex to the agreement (but no reference to lowering of purely domestic legislation)	Stronger governance procedures via: (i) ad hoc arbitration panel that can make binding decisions and issue sanctions (ii) third party referral system to allow individuals, trade unions and other interested parties to make complaints about the enforcement of the agreement (iii) a supranational court that interprets the agreement in line with the CJEU	Agreement updates in line with future legislation: this can be automatic or can allow for a process of consultation and decision-making; where there is disagreement over the incorporation of new rules into the agreement, this can trigger sanctions (eg partial suspension of the agreement)

In our view, under a 'high-integration' future relationship, the most robust available provisions for ensuring a 'level playing field' on employment protections post-Brexit would be based on a 'common rulebook' approach. This would include:

- a broad scope – with a UK commitment to retain a list of all EU-derived employment protections
- a robust governance mechanism – with a supervision authority and a supranational court that would oversee the agreement for the UK
- an updating mechanism – with a process for incorporating new EU-derived employment legislation into the agreement as and when it is introduced, including an option for the UK to diverge and face consequences for market access if it so chooses.

For maximal coverage, the agreement could also include a broad-based non-regression clause to prevent loosening of purely domestic standards on employment protections.

We recognise, however, that such an arrangement is less plausible in the event of a 'low-integration' future relationship. Under these circumstances, the most plausible and robust available provisions for ensuring a 'level playing field' on employment protections would be based on an 'enhanced non-regression clause' approach. This would have a broad scope – including an agreed list of commitments to all relevant EU-derived employment legislation – and robust governance arrangements – including a supranational court.

PART 1:
THE ROLE OF EU-DERIVED EMPLOYMENT PROTECTIONS IN THE UK

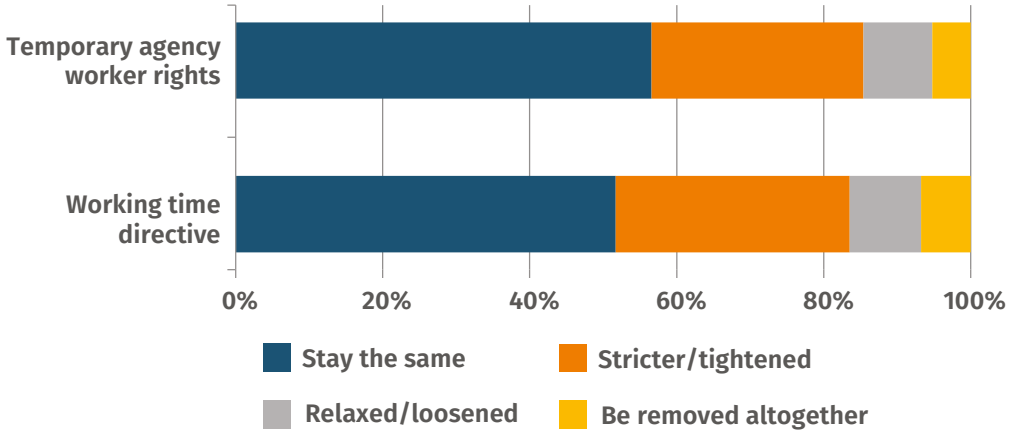
Both the UK and the EU are expected to negotiate an agreement on working conditions as part of their post-Brexit future partnership. This is often described as a 'level playing field' for employment protections.

For the EU, a level playing field on employment policy is essential to prevent the UK gaining an unfair competitive advantage over EU member states once it leaves. The level playing field is part of a wider set of commitments the EU wants to agree that covers areas such as state aid, competition and environmental protections (European Council 2018).

For the UK, there is a broad consensus in favour of protecting employment rights. IPPR's research with Opinium has found that clear majorities of the public support maintaining or strengthening a number of flagship EU-derived employment rights. Seventy-three per cent of people said they supported the protection or the extension of the Working Time Directive, while the same percentage backed maintaining or broadening temporary agency workers' rights (Morris 2018).

FIGURE 1.1

There is public support for either retaining EU-derived employment protections or extending them further



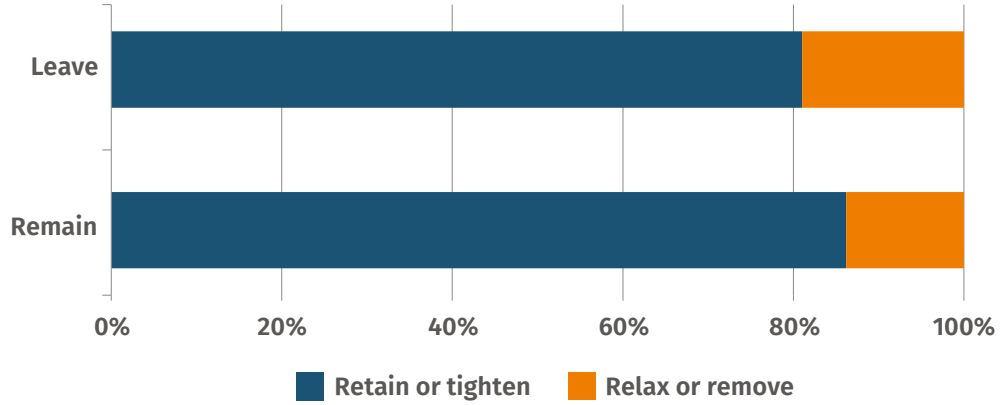
Source: IPPR/Opinium survey, 19–22 Jan 2018[1]

This support is broad-based: backing for these protections cuts across supporters of both the Remain and Leave campaigns (ibid).

1 The figures used for figure 1.1 and figure 1.2 do not precisely match those in the text, as those who answered 'don't know' have been excluded.

FIGURE 1.2

Support for the working time directive rights is strong among both those who supported remaining in and leaving the EU



Source: IPPR/Opinium survey, 19–22 Jan 2018

Given this clear public consensus, the government made a clear commitment to Parliament shortly after the referendum result that all EU legislation on employment rights would be brought into UK law (HC 2016). In her recent Mansion House speech on the UK's future relationship with the EU, prime minister Theresa May stated that in "areas like workers' rights or the environment, the EU should be confident that we will not engage in a race to the bottom in the standards and protections we set" (May 2018).

In addition, both unions and business groups back the protection of EU-derived employment rights. The TUC has been a leading voice in calling for the full protection of rights outside the EU, as well as alignment with future protections (TUC 2018). For its part, the CBI has said that businesses "are not seeking changes to EU-derived employment legislation after Brexit" (Lewis 2018).

There is also a growing recognition of the importance of employment protections for the economy. While in the past employment rights tended to be seen as a hindrance to growth, voices from across the spectrum have begun to make an argument for employment rights grounded on their economic benefits. As the final report of IPPR's broad-based Commission on Economic Justice argued, weak employment protections mean that it is easy to hire and fire workers and keep them on low pay. A cheap workforce in turn makes it less likely for employers to invest in productivity-enhancing technology. On the other hand, strong employment protections can bolster workers' bargaining power and thereby help to boost pay and productivity (IPPR 2018).

Given the broad public consensus, a central question for the UK and the EU is how best to uphold high employment standards after the UK leaves the EU through the provisions of the 'level playing field'. This report will set out the available options for the 'level playing field' for employment protections and assess their efficacy.

THE EU AND WORKERS' RIGHTS

We first briefly set out the role of EU-derived employment protections in the UK. Of course, the UK's employment policy extends far beyond the scope of EU-derived legislation. A great deal of the UK's seminal employment legislation predates

EU membership, while many more recent major steps forward – such as the introduction of the minimum wage – were introduced independently of the EU.

Nevertheless, the EU has played a critical role in the evolution of the UK's employment law. From its inception, the EU has included within its remit the fair treatment of workers. The Treaty of Rome, which laid the foundations of the single market and the 'four freedoms' of goods, services, people and capital, also included provisions on the harmonisation of working conditions and equal pay. The founding members intended to secure free trade across the bloc, but also wanted to prevent undercutting and 'social dumping'. To ensure no member could gain an unfair competitive advantage over another, they aimed to secure minimum standards for labour protections (Hyman 2008).

The process of extending EU employment rights was accelerated in the late 1980s, when Jacques Delors became president of the European Commission. He developed the idea of a 'social Europe', putting forward a new European 'social charter' for workers' rights, launching a 'social dialogue' process with trade unions and employer groups, and including a 'social chapter' within the Maastricht Treaty in 1991. While the UK opted out of the 'social chapter' at the time, it later joined (ibid). More recently, the commission's current president Jean-Claude Juncker has put forward a new European Pillar of Social Rights, aimed at delivering a range of further protections for workers.

In concrete terms, the influence of the EU in the UK has been felt in at least three ways:

- **Legislation**: the EU has passed legislation on employment rights that has helped to raise standards across member states, including the UK. As referred to above, the EU treaties contain core principles and objectives on employment protections, which are then given effect through secondary legislation. For the most part, this legislation has taken the form of directives, which set minimum standards for the UK to meet. The UK then transposes the directives into EU law, where it is given some flexibility to implement the measures in a way that is consistent with nationals laws and practices. In some areas, employment legislation is introduced via regulations, which are binding acts that immediately take effect across the EU member states (EU 2018).
- **Interpretation:** through the case law of the Court of Justice of the European Union (CJEU), the EU has also shaped the interpretation of its legislation in the UK. Domestic courts are required to interpret EU-derived legislation in line with the case law of the CJEU. The EU has consequently strengthened employment protections even in areas where UK law had already existed before EU legislation was introduced, because the interpretation of EU-derived legislation has to be consistent with CJEU decisions. The CJEU has ruled in favour of a stricter interpretation of employment rights on a number of occasions and has thereby encouraged a more robust interpretation of EU employment law by British courts (Ford 2016; Ewing 2017).
- **Individual rights:** the EU's legal order expands the scope for individuals to enforce their employment rights. Where the UK is failing to properly implement EU-derived employment protections, individuals are able to make complaints to the European Commission, who can then bring a case against the UK before the CJEU. (43 UK infringement cases have been initiated by the Commission on employment, social affairs and equal opportunities policy since 2002.[2]) Moreover, the principle of **direct effect** – which allows for EU legislation to be invoked directly before a UK court – has helped to significantly widen the scope for workers to make use of their rights. Combined with the principle of the **primacy** of EU law, direct effect allows individuals

2 http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/

to make claims on the basis of EU law before UK courts, and this law takes precedence where there is a conflict with domestic legislation. Finally, the principle of **state liability**, as established through the *Francovich* case, allows individuals to receive compensation from member states for losses suffered due to non-implementation of EU law (Ford 2016).

Over recent decades, the coverage of EU employment legislation has extended considerably. Drawing on existing studies (TUC 2016; Barnard 2017), the following categorisation includes the main areas where the EU has advanced protections for workers.

- **Working time and holiday pay**

  The Working Time Directive guarantees a maximum working week of 48 hours, alongside minimum rest periods and rest breaks. While individual employees in the UK can choose to opt out of the 48-hour limit, the legislation has had a significant effect on working time by promoting a default cap on hours (Dromey 2014). Further protections are included for workers on night shifts. In addition, the directive secured for the first time a minimum of four weeks' paid leave per year (European Commission 2003). CJEU case law has further strengthened the legislation – for instance, in the *Stringer* case, the CJEU found that workers on long-term sick leave can carry over their unused paid annual leave into a new leave year (Simpson 2016).

- **Equality and discrimination**

  Despite UK legislation on sex and race discrimination in many cases predating the EU – for instance, the UK's 1970 Equal Pay Act and the 1995 Disability Discrimination Act came before the EU legislated in these areas – EU rules have helped to clarify and strengthen the law in a number of places. Most notably, the EU treaties have fully guaranteed the right to equal pay for work of equal value, while CJEU case law has expanded the definition of indirect discrimination (TUC 2016). In *Enderby*, a critical piece of case law, the CJEU decided that where there is a 'prima facie' case of sex discrimination, due to significant differences in average pay between occupational groups, the burden of proof is on the employer to justify the disparity (ibid). Moreover, in *Marshall* the CJEU ruled that upper limits on compensation for discrimination claims were in conflict with EU law, requiring the UK government to remove all caps on compensation from its discrimination legislation (Simpson 2016). CJEU rulings also found that excluding part-time workers from occupational pension schemes constituted indirect sex discrimination, thereby guaranteeing hundreds of thousands of part-time female workers access to occupational pensions (TUC 2016). Finally, the 2010 Equality Act was developed both in order to transpose a set of EU directives and as a domestic initiative to advance and consolidate non-discrimination legislation and expand positive equality duties on public authorities (Hepple 2010).

- **Workplace restructuring**

  The 2001 Transfer of Undertakings Directive (and the consequent transposition into the 'TUPE' Regulations in the UK) protects employees' contractual entitlements when they are moved to a different organisation due to a merger or legal transfer. It aims to ensure that workers do not lose out through lower pay or working conditions as they are transferred to their new employer (European Commission 2001). The EU has also passed legislation to guarantee payment of outstanding claims in the case of insolvency (European Commission 2008a), as well as a period of consultation in the case of collective redundancies (see below).

- **Information and consultation**

  The EU has introduced a significant body of legislation to improve workers' rights to information and consultation. The 2002 Framework on Information and Consultation Directive sets broad principles for worker engagement – for instance, requiring information and consultation on an organisation's activities and economic situation, employment developments, and decisions that may lead to substantial organisational and contractual changes (European Commission 2002). The 1998 Collective Redundancies Directive ensures that employers considering collective redundancies consult ahead of time with employee representatives in order to try to find common agreement (with those who do not potentially facing financial penalties) (TUC 2016). Moreover, the 2009 European Works Council Directive enables employees in transnational organisations to set up cross-national bodies ('European Works Councils') to represent members at the European level. Workers in companies with at least 1,000 employees in the EU/EEA – including a minimum of 150 each in at least two member states – can request the creation of European Works Councils to improve information and consultation on issues that are cross-border in nature (European Commission 2011).

- **Occupational health and safety**

  While the UK introduced the 1974 Health and Safety at Work Act – the foundational piece of domestic occupational health and safety law – ahead of the EU's legislation in the field, the EU has nevertheless had an important influence on occupational health and safety in recent decades (TUC 2016). The 1989 Occupational Safety and Health (OSH) Framework Directive sets out a series of general principles of prevention, including avoiding risks, adapting work to the individual, and developing a coherent prevention policy. It requires employers to carry out risk assessments and facilitate adequate health and safety training (EU-OSHA 1989). The Framework Directive largely covered ground already within domestic legislation, but it did require the UK to make some modifications and extensions – e.g. extending health and safety rules to cover the police. Subsequent legislation has introduced rules in a number of specific areas and sectors, including manual handling of loads, temporary construction sites, surface and underground mining, artificial optical radiation, and asbestos (Barnard 2017).

- **Atypical work**

  EU law has also guaranteed protections for workers outside the typical employer-employee relationship – notably for part-time, temporary and agency workers. The 1997 Part-time Workers' Directive ensures that part-time workers cannot be less favourably treated than full-time workers and protects workers from being dismissed if they refuse to switch between part-time and full-time work (European Commission 1997). Similarly, the 1999 Fixed Term Work Directive ensures that employees on fixed term contracts cannot be treated less favourably than permanent employees and prevents employers abusing successive fixed term contracts with the same employee for the same work (European Commission 1999). Finally, the 2008 Temporary Agency Work Directive extends equal treatment with respect to pay and essential employment conditions to agency workers (European Commission 2008b).

- **Posted work**

  The recently revised Posted Workers Directive extends employment protections to posted workers (ie workers temporarily posted to another EU member state), guaranteeing them equal pay and working conditions with local workers in the host country (European Commission 2016).

- **Parental rights**

  The 1992 Pregnant Workers Directive aims to strengthen health and safety rules at work for pregnant women and for women who have recently given birth. The directive protects pregnant and breastfeeding women against being obliged to carry out work that would endanger their health and guarantees 14 weeks of maternity leave (EU-OSHA 1992). While maternity leave was already granted in the UK before the introduction of the directive, this directive and its interpretation (the *Dekker* case) helped to make it easier to prove sex discrimination on the grounds of unfair treatment due to pregnancy (TUC 2016). In addition, the 2010 Parental Leave Directive guarantees four months of leave for parents (either mothers or fathers) after the birth or adoption of the child and ensures the right to the same or equivalent employment after the period of parental leave ends (Prpic 2017). There are now plans to expand these rights further: the European Commission has put forward a proposal for a Work-Life Balance Directive, which would ensure parental leave is compensated by the employer at a minimum of sick pay level, would guarantee paternity leave of at least 10 days, and would introduce carers' leave for ill or dependent relatives (European Commission 2018a).

- **Contracts**

  The 1991 Written Statement Directive guarantees the right of employees to a written statement of the essential aspects of the employment relationship, including the place of work, the nature or category of the work, the start date and duration, the amount of paid leave, the notice period, the pay schedule, the length of the normal working day, and details of any collective agreements (TUC 2016). This directive is currently being revised (see chapter 3).

- **Data protection**

  While not typically considered as legislation on employment protections, data protection law also has a bearing on workers' rights. Most notably, the General Data Protection Regulation (GDPR) protects EU employees' rights to obtain personal information about themselves from their employer (ICO 2018). GDPR expands the definition of personal information and includes rights such as the right to be forgotten, the right to restriction of processing, and the right to data portability.

Alongside these developments spurred by EU policy-making, it is also important to note a number of areas where EU law has placed certain limits on workers' rights. In a series of judgments known as the *Laval* quartet, the CJEU ruled that certain forms of transnational collective action conflict with the free movement of services and the right of establishment (European Parliament 2010). For instance, in *Viking*, the CJEU ruled that collective action in a transnational context could conflict with the right of establishment. In *Laval*, the CJEU ruled that a trade union could not force, via industrial action, a service provider from a different member state to enter into negotiations on a collective agreement extending beyond the core minimum employment protections provided for in EU legislation. In *Rüffert*, the CJEU judged that public procurement rules that required following collective agreements on wages could under certain circumstances conflict with EU law on the posting of workers and the free movement of services. These judgments have proved extremely contentious. They indicate that the EU has at times prioritised the 'economic' sphere and the free movement of services over its 'social' sphere and the rights of workers. It is possible, however, that these judgments will in part be reversed in light of the introduction of the newly revised Posting of Workers Directive, as well as by future efforts to bolster the EU's social dimension through the Social Pillar (van der Starten 2017).

The rest of this briefing explores how the future partnership can continue to protect workers' rights after the UK leaves the EU, via the 'level playing field'. We will first assess how other agreements between the EU and third countries deal with employment protections. We will then set out the different mechanisms available for a 'level playing field' between the UK and the EU on employment policy and evaluate how effective they will be for guaranteeing protections post-Brexit.

PART 2:
EXISTING MODELS

Before turning to the Brexit negotiations, we first set out the international precedents for the EU's 'level playing field' on employment policy. The EU has negotiated a range of different types of commitments on employment protections with third countries as part of its trade deals. These commitments generally serve one of two purposes. First, they help to promote a 'level playing field' in trade between the EU and its trading partners, limiting the risk of unfair competitive practices and undercutting. Second, they are a means of encouraging stronger protections for workers in third countries. In other words, they allow the EU to 'export' its social model to other trading partners, alongside more tangible exports in goods and services. The EU is aiming to make trade policy 'not just about interests but also about values' (European Commission 2015).

In this section we look at the range of agreements the EU has concluded with third countries that include provisions on employment rights. For each, we explore the **scope** of the agreement, the **governance** arrangements, and the possibility of **future cooperation**.

THE EEA AGREEMENT

The most comprehensive provisions on employment rights negotiated between the EU and third countries are contained within the EEA Agreement. This agreement enables the participation of three EFTA countries – Norway, Iceland, and Liechtenstein – in the EU's single market. It is an example of a 'high-integration' model for future UK-EU trade relations.

At its core, the agreement binds the EEA EFTA countries to the four freedoms of the single market: the free movement of goods, services, people, and capital. Alongside the four freedoms, the EEA EFTA countries also sign up to a number of horizontal and flanking policies. These include a specific chapter on 'social policy', which outlines obligations on employment rights. The chapter highlights broad principles on "the need to promote improved working conditions and an improved standard living of workers" alongside specific commitments to adopt a range of EU-derived employment legislation (EFTA 2016).

This legislation covers nearly all aspects of EU-derived employment legislation (including on European Works Councils). The main exception is some of the EU's anti-discrimination legislation – notably the Racial Equality Directive and the Employment Equality Directive. This legislation is not considered 'EEA-relevant' as it does not relate to the functioning of the single market, and so it is placed outside the scope of the agreement (Hilton no date).

The EEA has a robust set of institutional measures for governing the agreement. It operates under a 'two pillar' structure of governance: the European Commission and the Court of Justice of the European Union (CJEU) enforce the agreement for the EU, while the EFTA Surveillance Authority and the EFTA Court enforce the agreement for the EEA EFTA states.

The job of the EFTA Surveillance Authority is to monitor how the agreement is enforced domestically by the EEA EFTA states and raise with the EFTA Court any instances where it considers the agreement has been breached. The EFTA

Court, on the other hand, is a supranational judicial body with three members – representing Norway, Iceland and Liechtenstein – that makes decisions on matters of EEA law. It is required to interpret EEA law in line with CJEU case law made prior to the date of the signature of the EEA agreement and to pay "due account" to CJEU case law made after the signing of the agreement.

The EFTA Surveillance Authority can bring cases to the EFTA court, and domestic courts can request advisory opinions on the interpretation of EEA provisions. Individuals can make their voices heard by either making a complaint to the EFTA Surveillance Authority, who may then bring a case to the EFTA Court, or by bringing a case to the domestic courts and asking for a reference onto the EFTA Court. Direct effect applies, but only with respect to implemented EEA legislation (known as 'quasi direct effect'). The EFTA Court cannot issues financial sanctions, but, as with EU law, it has ruled that the principle of state liability applies – ie where individuals have lost out due to member states not properly implementing EEA law, member states are obliged to compensate them (Baudenbacher 2012).

The EFTA Court is often seen as the 'little cousin' of the CJEU, generally mirroring its decision-making and interpretation of the EU's legal texts. This means that the employment protections within the EEA Agreement are governed in almost the same way as for member states within the EU itself. However, where the EFTA Court makes a judgment on EEA rules where there is no definitive guidance from prior CJEU case law, it can lead the way in the interpretation of legislation. Generally, the EFTA Court is seen as somewhat more economically liberal and market-oriented in approach than the CJEU (Baudenbacher 2017).

Another notable feature of the EEA Agreement is that it is dynamic rather than static – that is, it includes a process for updating the agreement in line with developments in EU legislation. Article 102 of the agreement notes that, where the EU plans to introduce a new piece of legislation relevant to the agreement, it must notify the EEA Joint Committee, which should then discuss the inclusion of this new law in the EEA Agreement. Where there is a disagreement over its inclusion, the joint committee should try to find a mutually acceptable resolution – including the possibility of recognising each other's legislation as equivalent (ie not identical but sufficiently similar in content to be considered as such). If agreement still cannot be reached after six months, then the relevant part of the EEA agreement can be regarded as provisionally suspended (EFTA 2016).

In practice, this means that the vast majority of EU legislation – including all relevant EU-derived employment legislation – is incorporated into the EEA agreement after it is introduced by the EU. There are, however, sometimes considerable delays in their implementation in Norway and Iceland (EFTA Surveillance Authority 2018).

THE EU-UKRAINE ASSOCIATION AGREEMENT

The EU has recently negotiated a series of association agreements with its neighbouring countries, covering trade and wider cooperation issues. Perhaps the most significant is the EU-Ukraine Association Agreement. The centrepiece of this association agreement is the Deep and Comprehensive Free Trade Agreement (DCFTA), applied since 1 January 2016. The DCFTA goes significantly beyond standard Free Trade Agreements in securing 'single market treatment' for Ukraine in a number of areas, including freedom of establishment and the free movement of cross-border services in certain sectors. In return for this market access, the EU expects that the Ukraine will align (or 'approximate') its legislation to that of the EU across a range of areas of trade policy (Kibasi and Morris 2017).

The DCFTA has a Trade and Sustainable Development Chapter (TSD) that includes commitments on employment and social policy, as well as other areas such

as environment protections. These chapters play an important role in the EU's modern trade agreements and are meant to ensure that economic partnerships go alongside higher employment and environmental standards (Harrison et al 2018).

Within the Trade and Sustainable Development Chapter of the EU-Ukraine Association Agreement, there is a set of typical commitments on employment protections. This includes a commitment to the effective implementation of fundamental International Labour Organisation (ILO) Conventions and a non-regression clause on labour standards (European Commission 2014a). These commitments broadly reflect the content of other Trade and Sustainable Development Chapters in modern EU FTAs, as discussed below.

Alongside these standard provisions, the Association Agreement includes an additional chapter on 'Cooperation on Employment, Social Policy and Equal Opportunities'. This chapter requires gradual alignment to a significant body of EU legislation on employment protections, covering labour law, anti-discrimination and gender policy, and occupational health and safety. It lists the relevant legislation and gives specific timeframes for their implementation by the Ukrainian government. The list includes all aspects of EU-derived employment legislation, with a handful of exceptions, such as protections for temporary agency workers and the European Work Councils Directive (ibid).

The EU-Ukraine Association Agreement has multiple governance arrangements. The overarching agreement, including the chapter on 'Cooperation on Employment, Social Policy and Equal Opportunities', is governed by a joint Association Council, alongside a number of other joint committees. The Association Council and the other committees are responsible for monitoring the agreement, including areas where Ukraine has committed to aligning with EU legislation. Notably, the agreement says this monitoring could include "on-the-spot missions" involving EU institutions. Where there is a dispute over the interpretation or implementation of the agreement, a request is submitted to the Association Council, which can make a binding decision on the issue. If the dispute is left unresolved for at least three months, the relevant party can choose to respond to their complaint with "appropriate measures" (ibid).

The Trade and Sustainable Development chapter is governed by separate arrangements. The Ukraine-EU Sub-Committee on Trade and Sustainable Development is tasked with monitoring the chapter and ensuring the provisions are not violated. The process of dispute resolution is broadly the same as with other EU free trade agreements, allowing for a process of consultation followed by the convening of a Panel of Experts. We discuss this model in greater detail below. The Trade and Sustainable Development chapter is excluded from the more formalised state-to-state dispute resolution mechanism covering other areas of trade and trade-related matters in the agreement (ibid).

Unlike the EEA Agreement, there is no formalised process of updating the EU-Ukraine Association Agreement as EU employment legislation develops. However, the overarching objective of the agreement is to approximate Ukrainian law to EU law, including in the area of employment protections. Moreover, the agreement does note that it may be updated by the Association Council to take into account the evolution of EU law over time. The spirit of the agreement is therefore dynamic in nature, even if there is no formal mechanism for incorporating new EU rules.

CETA (AND OTHER MODERN EU FREE-TRADE AGREEMENTS)

For standard free-trade agreements (FTAs) between the EU and third countries, much looser provisions apply for the protection of employment standards. Unlike the EEA Agreement and the EU-Ukraine Association Agreement, these standard FTAs are 'low-integration' agreements, where each party has greater regulatory

autonomy at the expense of additional barriers to trade. Here we use the example of CETA – the EU-Canada Free Trade Agreement – to illustrate how these agreements work, given that very similar employment provisions and governance mechanisms exist in other recent EU trade deals.

CETA contains three main commitments on labour rights in its chapter on Trade and Labour. First, it commits the EU and Canada to affirm ILO principles and rights, including the four categories within the ILO Declaration on Fundamental Principles and Rights at Work and the objectives of the ILO Decent Work agenda (see below).

Second, it commits both parties to a non-regression clause, stating that it is "inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards".

Third, it commits to cooperation on promoting employment protections, including activities such as exchange of best practice, engagement at the international level in bodies such as the WTO and the ILO, and dialogue and information-sharing. In this context, the agreement highlights the importance of social and civil society dialogue, noting that both parties will consider the perspectives of workers, employers and civil society organisations when planning cooperative activities (European Commission 2014b).

As is common in the EU's free trade agreements, CETA's Trade and Labour chapter (which should be considered in parallel with its Trade and Sustainable Development chapter) is governed by separate institutional arrangements to the rest of the agreement. Enforcement is carried out at the domestic level. Specific provisions within CETA call for the effective enforcement of employment protections through a system of labour inspection and administrative and judicial proceedings. Alongside this, each party is required to set up domestic advisory groups – comprised of a balance of employers, unions, labour and business organisations, as well as potentially other stakeholders – to submit opinions and provide advice on relevant issues. A joint Committee on Trade and Sustainable Development is responsible for the overarching governance of the chapter (ibid).

Where disputes arise, the chapter provides for a relatively light-touch process of dispute settlement, in comparison to the more formal state-to-state arbitration process outlined in other parts of CETA. Initially, the parties are meant to enter into consultations in an attempt to resolve a given dispute. Where required, they can refer the matter for consultation in the Committee on Trade and Sustainable Development, which in turn can seek the advice of each party's respective domestic advisory groups (ibid).

For issues that cannot be resolved through this method of consultation after a three-month period, the parties can convene a panel of experts to address the dispute. This panel is made up of three independent experts, chosen from a list of nine pre-selected people. The panel of experts is required to produce a final report to resolve the dispute; where it finds that one party has breached its labour obligations, the parties are required to discuss the report and "endeavour" to identify appropriate measures in response or set out a mutually agreed action plan. The Committee on Trade and Sustainable Development is then tasked with monitoring the follow-up resolution to the dispute. It is not clear what happens if the parties cannot agree on appropriate measures. Beyond this process, there are no sanctions applied to either party when there is evidence of an infraction. The dispute resolution mechanism therefore lacks teeth in effectively policing CETA (ibid).

Finally, while there are provisions for future cooperation on employment policy, CETA does not include any measures to formally align Canada's and the EU's future legislation on employment protections. Unlike the EEA Agreement or the

EU-Ukraine Association Agreement, there is no expectation that either party should align or approximate its legislation with the other.

NO DEAL – ILO CONVENTIONS

A country without a free trade agreement with the EU will of course have its own domestic labour standards and enforcement procedures. But there are also international standards it may follow, apart from its agreements with the EU (or indeed other trade partners). Most notably, countries may be members of the International Labour Organisation (ILO).

The ILO is a United Nations agency responsible for improving global labour standards and promoting social justice. It is comprised of 187 members, including the UK. Its tripartite structure allows for the participation of member state governments, employers, and workers in the development of labour standards and policies (ILO 2018a). The ILO has formulated a number of conventions embodying key principles of employment protections (ILO 2018b). These conventions are legally binding international treaties ratified by individual ILO member states. Just as third countries with no trade agreement with the EU may nevertheless be members of the World Trade Organisation (WTO) and therefore required to follow international trade law, countries with no labour agreement with the EU may nevertheless be members of the ILO and therefore be required to follow those ILO conventions they have ratified.

According to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, all ILO members have an obligation to comply with the four categories of principles and rights at work.

1. Freedom of association and the effective recognition of the right to collective bargaining.
2. The elimination of all forms of forced or compulsory labour.
3. The effective abolition of child labour.
4. The elimination of discrimination in respect of employment and occupation.

The four principles and rights at work are expressed in greater detail in the eight 'core' conventions. These conventions set out broad principles and basic floors on workers' rights, but they do not reflect the level of detail provided in EU law (ILO 2003).

The UK is a founding member of the ILO and has ratified 87 ILO conventions (including all eight fundamental conventions) and two protocols, 52 of which are in force (ILO 2018c). However, there are also a number of key conventions the UK has chosen not to ratify, including convention 154 on collective bargaining and convention 189 on the protection of domestic workers. The UK has chosen to not ratify a total of 46 conventions, compared to 33 for Germany, 28 for France, and 30 for Italy (ILO 2018d).

The ILO's conventions are generally weakly enforced and governed. The main tools for governance include a regular system of supervision – requiring member states to submit periodic reports on the implementation of ratified ILO conventions – and special procedures for managing infractions. The ILO's complaints procedure allows its Governing Body, delegates to the International Labour Conference and member states to make complaints against a member state considered to not be implementing a ratified convention. The ILO's governing body can then convene a Commission of Inquiry to investigate the complaint and issue recommendations. If there is disagreement on the resulting recommendations, the complaint can be referred on to the International Court of Justice. Where the member state refuses to comply with the recommendations, the ILO Governing Body can recommend to

the International Labour Conference such action as it deems "wise and expedient" to ensure compliance (ILO 2018e).

Yet despite the existence of these mechanisms, in practice they are only used for the most serious and persistent violations of ILO conventions. Moreover, there is no requirement for ILO member states to comply with these conventions. ILO member states can therefore decide not to ratify some of the new conventions or even denounce ones they have signed previously. Indeed, unlike some countries, the UK's legal system does not take ILO conventions particularly seriously. Moreover, the UK has denounced a number of up-to-date ILO conventions, including the Labour Clauses (Public Contracts) convention in 1982 and the Protection of Wages convention in 1983 (European Commission 2003). More recently, many have criticised the Trade Union Act 2016 for disregarding ILO conventions 87 and 98 on the freedom of association and the right to organise (Whitfield 2017).

Apart from monitoring adherence to the conventions, the ILO and its members engage in ongoing cooperation on the setting and promotion of labour standards and the development of related policies and programmes. In particular, the ILO has in recent years developed a Decent Work Agenda, aimed at delivering quality jobs alongside strong social protections and workers' rights. This agenda is built on four key pillars: employment creation, social protection, rights at work, and social dialogue (ILO 2018f). To progress its ambitions, the ILO's annual conference can adopt new conventions and recommendations (ILO 2018b). But members are free to choose whether they ratify the conventions or not, and given the range of countries that are ILO members, these conventions are not as far-reaching or specific as EU legislation.

SUMMARY

The EU's agreements with third countries vary considerably in the content of their provisions on employment protections. At one end of the scale, the EEA Agreement ensures that signatories align themselves with the vast majority of EU legislation on employment rights, has robust governance mechanisms for enforcing these rights – mirroring many of the EU's institutions – and is updated in line with legislative developments. The EU-Ukraine Association Agreement is similarly expansive, though has somewhat weaker governance mechanisms and lacks a formal process of updating legislation.

There is, however, a significant gap between these agreements and the standard Trade and Sustainability chapters in the EU's other free trade agreements, such as CETA. The non-regression clauses in these agreements tend to be vague and weakly enforced. They require only the upholding of domestic standards rather than processes for aligning or approximating legislation. To this extent, these agreements often do not go significantly beyond the protections detailed within the ILO's conventions, which for their part also have limited enforcement procedures. We summarise these differences in the table below.

TABLE 2.1

Provisions for employment protections in selected EU agreements with third countries

Agreement	Scope	Governance	Cooperation
EEA Agreement	All EU employment legislation, with some exceptions (including some anti-discrimination law)'	Strong: EFTA surveillance authority and EFTA court	Dynamic agreement: Formal process of updating EEA-relevant legislation in line with evolution of EU law
EU-Ukraine Association Agreement	All EU employment legislation, with some exceptions (including temporary agency workers' rights and European Works Council directive)	Moderate: Monitoring and dispute resolution through Association Council (including on-the-spot missions)	Dynamic in spirit: no formal process of updating but expectation of onward approximation of Ukrainian employment legislation to EU law
CETA (EU-Canada) and other modern free-trade agreements	ILO fundamental principles and non-regression clause on domestic labour standards in respect of encouraging trade and investment	Weak: Consultations in Trade and Sustainability Committee and 'panel of experts' (no formal sanctions)	General cooperation (information-sharing, exchange of best practice, etc) but no expectation of updating legislation

PART 3:
OPTIONS FOR THE 'LEVEL PLAYING FIELD'

Given the past agreements on employment protections between the EU and third countries discussed in the previous chapter, what are the options for the UK's future partnership with the EU? Before exploring the available options, we first set out the current EU and UK positions.

WHAT DOES THE EU WANT?

The European Council negotiating guidelines for the future partnership make clear that the EU is seeking a 'level playing field' for future trade. As a longstanding economic partner and close neighbour of the EU, attempts by the UK to gain a competitive advantage over EU businesses could prove particularly detrimental to member state economies. To militate against this risk, the EU wants robust provisions in place to prevent undercutting. In the words of the European Council guidelines:

> ***"The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, tax, social, environment and regulatory measures and practices. This will require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness."***
>
> ***European Council (2018)***

In referring to 'social' measures, the European Commission's slides on the 'level playing field' make clear that this encompasses areas of employment protection. In particular, the European Commission highlights that the risk of the UK opting out of provisions related to workplace restructuring (such as the Acquired Rights Directive and the right to information and consultation in relation to collective redundancies), occupational health and safety (on, for example, chemicals and carcinogens), and collective bargaining rights. It also notes that the UK could set up 'export processing zones' (EPZs) – specific areas where looser trade, regulatory and customs rules apply – and could remove employment protections for workers based in these zones in an attempt to boost trade (European Commission 2018b).

The European Commission therefore calls for a non-regression clause to ensure no backtracking on employment protections "below the pre-Brexit level" after the UK leaves.[3] Alongside this the commission wants a commitment to "principles and substantive provisions" on employment conditions based on international (ie ILO) and European law. According to the European Commission, the non-regression clause and accompanying commitments would include areas such as occupational health and safety, fair working conditions and employment standards, labour inspection and access to remedies, information and consultation rights, and fair wages (ibid).

3 We assume that this non-regression clause would apply to lowering of protections introduced before the end of the transition period, rather than to protections introduced after this point.

For the level playing field as a whole, including with respect to employment protections, the EU calls for enforcement mechanisms at both the domestic and international level. In particular, the commission specifies a "joint monitoring and review mechanism" to oversee the level playing field. In addition, the commission sees the need for a dispute settlement system, delivered through a discussion forum at the first stage and a formal dispute settlement procedure if discussion fails. While the details of how this might work are not specified, the commission highlights that any judicial process must respect the autonomy of the CJEU – ie only the CJEU can interpret concepts deriving from EU law.[4] Finally, the commission highlights potential options for sanctions if the dispute settlement procedure concludes that there is a violation, including fines, suspensions of market access, and a 'guillotine clause' that would negate the entire UK-EU trade agreement.

The EU of course makes this proposal in the context of an FTA; for a more integrated economic relationship, it is likely that the European Council guidelines would be redrawn and would require more extensive commitments on employment protections. Nevertheless, the EU's specifications for a 'level playing field' with the UK go beyond its normal expectations in free trade agreements with third countries, because the European Council sees the possibility of UK deregulation – given its size and proximity – as posing a particular risk to the EU's economic interests.

WHAT DOES THE UK GOVERNMENT WANT?

For its part, the UK government has made clear that it is committed to retaining EU-derived employment rights. Through the Withdrawal Act, nearly all EU-derived legislation will be translated into UK law to ensure continuity after Brexit. While most EU-derived employment legislation is in the form of directives, and so has been transposed into UK law already, in some cases this process has relied on provisions within the European Communities Act; therefore, once the European Communities Act is repealed after Brexit these laws need to be preserved through legislation to ensure they do not fall away. Through the Withdrawal Act, the government should in large part maintain continuity of employment legislation.

In fact, as published in the recent technical notice, even in the event of a 'no deal' with the EU, the Withdrawal Act will guarantee the vast majority of EU-derived employment legislation at the point of exit (BEIS 2018). Yet there are some areas of EU employment legislation that will prove harder to retain in the event of 'no deal', such as the European Works Council directive, as this requires transnational cooperation and cannot be guaranteed unilaterally.

Moreover, the Withdrawal Act does not retain the Charter of Fundamental Rights within UK law. The Charter includes broad commitments such as the right to access to justice and has been used as the basis for successful claims in the UK's domestic courts (for example the *Benkharbouche* case, where the UK Supreme Court relied on the charter to disapply the State Immunity Act 1978, to the extent that it gives embassies immunity from EU-derived employment rights for non-UK staff) (Young 2017).

For the most part, however, the Withdrawal Act will maintain current employment rights. This of course only applies on 'day one' after Brexit – depending on the nature of the final agreement between the UK and the EU, the UK could make changes to this legislation after withdrawal. If the Article 50 Withdrawal Agreement is successfully negotiated, this will provide for a further transition period where the UK continues to adopt the entirety of the EU acquis, including all relevant employment legislation. However, the transition period will end in December 2020;

4 The commission slides do not refer, however, to the fact that the CJEU only precludes other bodies from interpreting concepts derived from EU law for EU member states and its institutions, rather than for all states.

after this point, EU-derived employment legislation will only be governed within the constraints of the future partnership.

What, then, does the UK government want for the future partnership? On the one hand, the government has been clear that after the transition period it wants to stop the law-making powers of the EU's institutions in the UK, remove the principles of direct effect and the supremacy of EU law, and end the jurisdiction of the Court of Justice of the European Union (DExEU 2018a).

On the other hand, the government nevertheless recognises the need to agree arrangements on employment protections with the EU as part of the future trade partnership. In response to the European Council guidelines, the UK government has proposed in its white paper on the future partnership a 'non-regression requirement' for domestic labour standards, as well as a joint UK-EU commitment to uphold ILO obligations (DExEU 2018a). Unlike in other areas of the 'level playing field', such as for state aid, the White Paper does not commit to a 'common rulebook' on standards, which would entail stricter enforcement requirements (see below for further details).

The government has also published slides clarifying that its non-regression requirements would go beyond typical non-regression clauses in free trade agreements, because the UK would "start with the same standards as the EU's, and in some cases higher standards", the UK would have stronger domestic enforcement procedures, and the agreement would have more robust governance arrangements (DExEU 2018b). While there are still ambiguities in the scope and governance arrangements, it is nevertheless significant that the UK has made such a commitment as part of its Chequers proposal. This indicates the potential for a positive agreement between the UK and the EU on the level playing field.

So how might the UK and the EU make such commitments on employment standards? Drawing on the analysis in the previous section, we outline the available options for the negotiations.

OPTION 1: STANDARD NON-REGRESSION CLAUSE

As explained in the previous section, there are typically three main aspects of the EU's labour chapters in its free trade agreements with third countries. First, there is an agreement on upholding substantive provisions of ILO law; second, there is an agreement on cooperation and social dialogue; and third, there is an agreement on non-regression of labour standards. The first two aspects are relatively non-controversial. (Indeed, given the UK's typical approach to ILO law, this commitment is likely to be relatively peripheral for upholding employment standards). In this section we therefore focus on the latter.

There are three key weakness of standard non-regression clauses – relating to **scope**, **governance**, and **future legislation**.

First is the issue of scope. Typically, non-regression clauses within the EU's free trade agreements (FTAs) aim to prevent each party from "encouraging trade and investment" by either lowering protections or failing to enforce protections. That is, non-regression clauses are not designed to stop the relaxing of all existing employment protections *per se*; they are only designed to stop their relaxation to the extent that such deregulation is intended to distort trade and investment flows. This limits their effectiveness because it is difficult to prove when a party loosens regulations with the intention of encouraging trade and investment (Harrison et al 2017).

An illustration of these difficulties is the trade agreement between the EU and Peru. This agreement contains provisions on the non-regression of labour

standards, but since the agreement has come into force Peru has lowered protections in occupational health and safety and in labour inspections. Yet the European Commission would be unable to determine whether this counts as a breach of the agreement because it would be difficult to judge whether these regulatory changes were introduced to encourage trade and investment (Orbie and Van den Putte 2016).

Moreover, a non-regression clause for employment legislation does not generally extend to participation in transnational legislation. The European Works Council directive would therefore lie outside its scope. A non-regression clause would do nothing to prevent the UK from no longer being a member state for the purposes of the directive (see European Commission 2018c). As a result, under this scenario new European Works Councils would no longer be based out of the UK and UK employees might lose their rights to be represented.

Second, the governance mechanisms for non-regression clauses are generally very weak. Adherence to labour standards is typically monitored via a joint committee and parallel forums of civil society representatives. Dispute resolution is typically managed through state-to-state consultation. As a last resort, disputes can be resolved by an ad hoc 'panel of experts', which can issue non-binding recommendations for either party (Marx et al 2016). If a party does not comply with these resolutions, there are typically no provisions for sanctions.

These processes are set aside for an agreement's 'trade and labour' or 'trade and sustainability' chapters; they do not apply to the rest of the free trade agreement, which is normally governed by a more formalised state-to-state dispute resolution mechanism. The governance measures for labour standards in EU trade agreements are therefore often weaker than for other trade issues (ibid). Moreover, in practice the EU is reluctant to enforce non-regression clauses in trade agreements because they are not seen as a priority for the EU's wider trade agenda (Harrison et al 2017).

Some recent EU free trade agreements have more robust provisions for governing labour non-regression clauses. For instance, as noted in the previous chapter, the Canada-EU trade agreement (CETA) contains stronger provisions on domestic enforcement and work inspections (ibid). However, overall these agreements still follow broadly the same structure as other FTAs: a light-touch monitoring regime combined with non-binding ad-hoc expert panels. Without proper enforcement mechanisms, standard non-regression clauses are therefore rendered largely ineffective in practice.

Third, by definition non-regression clauses make no reference to future EU legislation; they only cover protection of existing legislation and make no promise of improvements. For securing a 'level playing field' with the EU, this is arguably inadequate, because there is a significant risk that UK and EU employment law will diverge over time. In particular, it is possible that UK employment protections may fall behind EU employment protections if UK law is not updated to reflect developments in EU legislation. This could disrupt the 'level playing field' and distort trade between the UK and the EU.

In their usual form, non-regression clauses are therefore not sufficient to protect employment rights in the UK and guarantee a 'level playing field' between the UK and the EU. From their interventions so far, it appears that both the UK and the EU recognise the limitations of the standard non-regression approach. It is therefore essential to consider how this approach can be strengthened for the UK-EU future relationship.

OPTION 2: 'ENHANCED' NON-REGRESSION CLAUSE

There are two key main ways a standard non-regression clause can be enhanced: (i) through expanding the **scope** of the clause and (ii) through strengthening the **governance** of the clause.

Scope

Some trade experts have argued that it is possible to expand the scope of non-regression clauses by taking an outcomes-based approach rather than an intentions-based approach to impacts on trade and investment. To demonstrate a breach of the non-regression clause often requires showing an intention to boost trade and investment. But it is very hard to prove that a government has loosened legislation with an intention to attract trade and investment, given there may be myriad indistinct motives for the introduction of a new piece of employment legislation. On the other hand, it could be more straightforward to prove that changes to employment legislation have had an effect on trade and investment outcomes, as this could simply be shown by pointing to data on trade and investment flows (Harrison et al 2017).

Yet an outcomes-based approach would still have relatively limited scope for the protection of employment rights. This is because it can be difficult to prove a causal link between changes in employment legislation and patterns in trade and investment. Moreover, in many cases a government might loosen employment protections without it having any effect in encouraging trade and investment (even if this is the intention). In these cases, an outcomes-based non-regression cause would offer little protection for workers.

A more expansive non-regression clause would prohibit the loosening of employment protections under all circumstances, irrespective of their relation to trade and investment flows. This would allow for a simpler test to determine whether the non-regression clause had been flouted or not: the only relevant considerations would be the employment legislation and its enforcement, rather than any consequences for trade and investment.

Another relevant question for the scope of the agreement is how employment protections are defined. In most non-regression clauses, the definition is relatively imprecise: they simply refer, for instance, to the "weakening or reducing [of] the levels of protection afforded in their labour laws and standards" (European Commission 2014b). To clarify the meaning of the agreement and ensure full coverage of existing EU-derived employment rights, the UK and the EU could consider including an annex with a list of the relevant EU-derived pieces of legislation that would be included within the scope of the non-regression clause. This would more closely mirror the scope of the EU-Ukraine Association Agreement and the EEA Agreement, as discussed in the previous section.

At the same time, if a specific list-based approach replaced an imprecise non-regression requirement this could limit the scope of the clause. There are two reasons for this. First, an imprecise non-regression clause could be interpreted in an expansive sense by the relevant court or arbitration body; this could help to extend the protection of workers' rights. By contrast, a list of specific regulations would allow less room for a broader interpretation. Second, a non-regression clause that refers to all forms of employment deregulation could also relate to purely domestic employment legislation, such as the national minimum wage. An imprecise non-regression clause could therefore encapsulate a greater set of employment protections – both EU-derived rules and domestic-derived rules – compared to a specific list of EU-derived employment directives. For these reasons, the best way to maximise the scope of the non-regression requirement

would be to include both a broad obligation and a specific list of commitments to EU-derived employment legislation.

Governance

The other main aspect of an 'enhanced' non-regression clause is its mechanisms for governing the agreement. Under a standard non-regression clause, enforcement takes place at the domestic level, overseen by a joint committee; where there are disagreements, there is an option for consultation, followed by a 'Panel of Experts', which would issue a non-binding recommendation on the matter at hand. But there are a number of options for a more formalised process of governing a future UK-EU non-regression clause on employment standards. We will discuss three options: (i) an arbitration panel (ii) a third-party referral system and (iii) a supranational court.

1. **An arbitration panel**

   First, there is the approach that the UK government has suggested for the institutional arrangements in its White Paper on the future partnership (DExEU 2018a). This would allow for the creation of an ad hoc arbitration panel in the event of a disagreement between the two sides that could not be resolved through consultation or a joint committee. Unlike the 'Panel of Experts', this arbitration panel would be able to issue binding rulings on either party. If the decision was not complied with then it would instigate formal sanctions. In the event of a breach, these sanctions could vary in nature: they could include financial penalties or they could involve a (temporary) suspension of parts of the agreement.

   Of course, the strength of this governance mechanism would depend on the nature of the arbitration panel. In their standard form, these panels have a number of weaknesses. As they are formed on an ad hoc basis, they lack consistency in approach. Moreover, they do not adhere to the principle of precedent: previous decisions do not have a direct bearing on future cases (either formally or informally). They also lack transparency over their decision-making procedures. Finally, in many cases they do not allow the opportunity for parties to appeal a particular decision (Hogarth 2017).

   There are ways of strengthening the structure of an arbitration panel to help address these concerns. For instance, transparency could be improved by requiring legal submissions by each party to be made public or by holding the proceedings in open court. Transparency over decision-making could help to encourage consistency, as it would more easily allow arbitrators to base their legal arguments on earlier decisions. The arbitration panel could also include an appeals process, modelled for instance on the WTO Appellate Body, which is a permanent (or 'standing') court made up of seven members who hear appeals from decisions of WTO arbitration panels (Hogarth 2017).

   In addition, the UK-EU agreement could strengthen the consistency of the arbitration panel by obliging it to make references to a separate court. This is the procedure proposed by the government in the White Paper: for areas of the UK-EU agreement where the UK agrees to align with EU rules, the arbitration panel would be able to make a reference to the CJEU, which would then make a ruling on the interpretation of the relevant piece of EU legislation. The arbitration panel would then need to resolve the dispute in line with the CJEU's interpretation (DExEU 2018b).

   The UK government has included this provision within its institutional arrangements because it is expected this will be required in order for the future partnership to be consistent with the autonomy of the CJEU – a key red line for the EU. But this provision, apart from ensuring the legal viability

of the future partnership, could also help to improve consistency in how the arbitration panel would manage disputes between the two sides.

2. A third party referral system

However, the key weakness of an arbitration panel in its standard form is that it is a purely state-to-state procedure: i.e. it provides no route for individuals, rather than governments, to make complaints or bring forward cases. The second option for governing an 'enhanced' non-regression clause is therefore a third party referral system, which would allow for individuals, trade unions, and other stakeholders to initiate disputes themselves.

This mechanism could be modelled on the labour provisions within the United States' trade agreements with other countries. These agreements do allow for third parties to raise complaints about the enforcement of their non-regression clauses.

For instance, alongside NAFTA, the US, Canada and Mexico agreed the NAALC (the North American Agreement on Labour Cooperation). The NAALC requires each partner to set up National Administrative Offices (NAOs) within its labour departments. Individuals can raise complaints to NAOs, who will then review the complaint and try to come to a conclusion together on the matter at hand. If the NAO officials cannot agree, then they can consult with the affected countries' labour ministers; if there is still no resolution, they can refer the case on to the Ministerial Council, a grouping of the relevant labour ministers from the three countries. If no agreement can be found here, then more serious cases can be referred on to a 'Committee of Experts', which makes non-binding recommendations (similar to the 'Panel of Experts' in EU free trade agreements). Finally, for the most serious cases – for instance relating to the minimum wage, child labour, or occupational health and safety – then the ministerial council as a last resort can summon an arbitration panel, which has the ability to impose financial sanctions (Brower 2008).

Similarly, a third-party referral mechanism in the UK-EU agreement could operate through an arms-length government agency that receives individual complaints. For instance, the UK could set up an independent Employment Protections Agency to receive complaints from individual employees, trade unions, NGOs, and other interested parties.

This could be modelled on the Trade Remedies Authority that the government is planning to introduce after Brexit, to take on responsibilities currently carried out by the European Commission. Just as the Trade Remedies Authority is tasked with investigating complaints brought by companies about unfair trade practices (such as dumping), the Employment Protections Authority (EPA) could be tasked with investigating complaints brought by workers and trade unions about employment practices that contravene the UK-EU non-regression clause. The EPA could make recommendations to the UK government to address the complaint; where the EU is unsatisfied with the UK's response, it could then summon an arbitration panel to issue a binding decision, with the power to issue financial sanctions. On the EU's side of the agreement, the commission would in effect fulfil the role of the EPA, as it can receive complaints directly from individuals and is independent of member states.

This model would create a route for individual workers to enforce their rights. It nevertheless contains a number of weaknesses. Many of the issues identified earlier in arbitration panels would apply equally here: at the final stage, a third-party referral system would have no permanent arbitrators, would lack transparency, and would struggle to maintain a consistent approach. Indeed, since its introduction, NAFTA's

NAALC provision has never reached the final 'arbitration panel' stage, suggesting it is used more as a cooperative process rather than a formal legal mechanism for enforcing standards (Brower 2008). It may also be difficult for the EPA to truly operate as an independent UK body without a supranational element. For these reasons, we explore a third, more ambitious process of governance: a supranational court.

3. A supranational court

The third option would take a more formal and comprehensive approach to governance than an arbitration panel. Under this model, a supranational UK-EU court would enforce the non-regression clause. This model would be most suited to a 'list-based' approach, where EU-derived legislation is specified in the agreement's annex. Following the structure of the EFTA Court, this supranational court would have the following features (EFTA Court 1992; EFTA 2016).

- The court members would be permanent – ie it would be a standing rather than an ad hoc body.
- The court would consist of judges selected by both the UK and the EU (and possibly judges from a third party).
- The court would have its own budget, premises, and secretariat.
- The court would operate alongside an independent supranational Supervision Authority, which would monitor the UK's adherence to the agreement. The authority would similarly be made up of both UK and EU officials (and possibly officials from a third party).
- Individuals could make complaints to the Supervision Authority, which would then be able to make a reference to the supranational court.
- Domestic courts would be expected to cooperate with the supranational court and ensure the correct application of the agreement. Where appropriate, domestic courts would be expected to ask the supranational court to provide advisory opinions with respect to the interpretation of the agreement.
- The principle of state liability would apply – ie individuals could receive compensation for losses experienced due to the UK failing to properly implement the agreement.
- The court would only have jurisdiction over the UK; it would not have jurisdiction over the EU institutions or member states.
- The court would ensure homogeneity with the CJEU in its interpretation of EU law.
- For direct actions (ie cases that are not advisory opinions), the court's decisions would be binding on the UK.
- Where there were disputes over the interpretation or application of the agreement, this would trigger a dispute resolution process managed by a joint UK-EU committee. If the committee is unable to resolve the dispute after six months, then each party may take 'safeguard measures' to address any economic, societal or environmental difficulties, or alternatively they may suspend the relevant part of the agreement.

This approach mirrors the process of governance within the EEA agreement. It provides a number of advantages in protecting employment rights compared with the other options. As a permanent court with a strict responsibility to interpret EU law in line with the CJEU, it would help improve legal certainty. A consistent interpretation of employment protections would also support the principle of a 'level playing field' between the UK and the EU; under this approach, it would be hard for either party to water down employment rights by loosening their

interpretation of the relevant legislation. The principle of state liability would allow for proportionate sanctions in the event of non-implementation. And of course by allowing individuals to enforce their rights via complaints to the Supervision Authority or via references from the domestic courts, it addresses the problem that governments themselves may be reluctant to properly enforce non-regression clauses on employment rights when their future trading relationship is at stake.

A supranational court therefore provides the most robust governance procedures for a non-regression clause on employment rights. But there are some legal and political difficulties with this proposal. It is possible that the UK-EU court would be struck down by the CJEU as incompatible with the EU treaties, because it interferes with the autonomy of the EU's legal order. But if designed so that it mirrors the structure of the EFTA court, which was considered acceptable by the CJEU, then this would minimise the possibility of a legal challenge (see Kibasi and Morris 2017).

It is also possible that the EU would reject a UK-EU court as imbalanced; because, unlike the EFTA court, which has jurisdiction over three EEA EFTA countries (Norway, Iceland and Liechtenstein), the UK-EU court would have jurisdiction over only the UK. Whether a UK-EU court would prove acceptable to the EU would depend on the development of the negotiations and the precise details of the proposed system. If the court and supervisory mechanism have a fair balance of representation of UK, EU and third-party members, then it may be considered acceptable; if the members are weighted heavily towards the UK, then the model may be perceived as the UK trying to 'mark its own homework' (Hogarth 2017).

An alternative version of a supranational court would simply involve the UK 'docking' to the EFTA court. Carl Baudenbacher, former president of the EFTA Court, has proposed that the UK could use the EFTA court to govern its future partnership with the EU, without necessarily signing up to the EEA agreement (Baudenbacher 2017). In the case of the non-regression clause on employment rights, the EFTA court could enforce this in the UK in the same way that it has enforced the EEA agreement in the three EEA EFTA states.

'Docking' with the EFTA court would ensure consistent interpretation with the CJEU on EU-derived employment protections. While the EFTA court has generally been seen as somewhat more market-oriented than the CJEU, it is required to keep in close uniformity with CJEU case law. Indeed, in some instances with no prior CJEU case law, the EFTA court has led the way in taking an expansive interpretation of employment rights – for instance, in the recent *Thorbjorn Selstad Thue* case the EFTA court found that the time travelling between home and a temporary place of work could count as working time for the purposes of the Working Time Directive (Davey 2018).

Yet regardless of the governance arrangements put in place, an 'enhanced' non-regression clause of any type will not account for future changes in employment law. By definition, a non-regression clause is about keeping current protections in place, rather than looking ahead to resolve future protections. Indeed, a non-regression clause is not about alignment or approximation of each other's legislation at all; it is simply about upholding one's own domestic standards. Of course, in the case of the UK and the EU, a non-regression clause means *de facto* alignment on prior EU legislation, because up until the point of Brexit the UK has adopted all EU-derived employment law. But this could change after the UK leaves. To account for future legislation, then, the UK and the EU would need to agree an entirely different mechanism for the protection of workers' rights.

OPTION 3: A 'COMMON RULEBOOK'

In some areas of the future partnership, the UK has proposed a 'common rulebook' with the EU. The idea of the 'common rulebook' is that the UK would continue to align itself with relevant EU legislation. Not only would it stick to current rules; it would also update its rules to reflect changes in EU legislation over time. Typically, a 'common rulebook' would apply in the event of a high-integration relationship between the UK and the EU. It is unlikely that the EU would expect the UK to uphold a 'common rulebook' in a low-integration relationship, given this would represent a marked difference in approach compared to employment provisions in its FTAs with other third countries, such as CETA.

A 'common rulebook' would include legislation with transnational effects. A 'common rulebook' on employment protections would therefore include within its scope the European Works Councils Directive.

The UK government's White Paper has proposed that the UK will sign up to a 'common rulebook' in a number of areas, including state aid. But it has not committed to a 'common rulebook' on employment rights and other parts of the 'level playing field' (including environmental and consumer protections).

The term 'common rulebook' is not typically used in trade policy, but it bears a strong resemblance to other aspects of EU trade agreements. In particular, the EEA agreement is dynamic rather than static in nature – that is, it includes a mechanism for updating the agreement to take into account new EU legislation that has a bearing on the single market.

The 'common rulebook' is not simply a matter of theoretic importance. In the context of the European Commission's initiative on the European Pillar of Social Rights, there are a number of forthcoming developments in EU employment legislation that, if not incorporated into the UK-EU agreement, will leave the UK falling behind in its worker protections.[5] Upcoming legislation in the commission's pipeline includes:

- **Directive on Work-Life Balance for Parents and Carers**: this directive will introduce paternity leave and carers' leave, will strengthen rules on parental leave, and will extend the right to request flexible working arrangements (European Commission 2018a).
- **Directive on Transparent and Predictable Working Conditions**: the commission is proposing this directive to extend workers' rights in a number of areas, including the right to more complete information on essential aspects of work, a limit to the length of probationary periods, the right to receive cost-free mandatory training, and a ban on exclusivity clauses and limit on incompatibility clauses. The directive will repeal and extend the Written Statement Directive, in order to ensure that it applies to a greater number of those with atypical work arrangements, including zero-hour contracts, casual work, and domestic work (European Commission 2018d).
- **Regulation establishing a European Labour Authority:** this regulation will create a new permanent body of approximately 140 officials to ensure proper enforcement of EU employment rules, focusing on workers and companies within the EU in a cross-border situation (eg posted workers). The Authority will support greater cooperation between national labour authorities, deal with cross-border disputes, and provide relevant information to individuals and employers (European Commission 2018e).

5 It is possible that some of these legislative developments will be introduced during the post-Brexit transition period, in which case they should be incorporated into UK legislation.

As with the 'non-regression' approach, the 'common rulebook' approach raises similar questions of scope and governance. With respect to scope, the 'common rulebook' by definition would cover all areas of EU employment legislation, typically specified through a list of the relevant legislation included within an annex to the agreement. In this sense it would have maximal scope for employment protections. However, unlike a non-regression clause, it would not prohibit the lowering of purely domestic legislation (for example the national minimum wage). To maximise the scope of any future agreement on employment protections, it may therefore be sensible to combine a 'common rulebook' approach (which aligns the UK's and EU's employment protections) with a separate non-regression clause (which prevents the UK from rowing back on its own employment protections).

With respect to governance, as with the 'enhanced' non-regression clause, there are a number of options, including an arbitration panel, a third-party referral mechanism, and a supranational court. As we outlined in our discussion of non-regression requirements, the most robust and expansive protection of employment rights is best guaranteed through a supranational court system.

The key question for the 'common rulebook' approach relates to the third aspect of EU agreements on workers' rights: the treatment of future EU legislation on employment protections.

There are a number of ways of implementing the 'common rulebook' and making the agreement dynamic with respect to employment protections. At one end of the spectrum, the agreement could automatically incorporate new EU-derived employment rights into the agreement, with minimal scope for debate or deliberation. This is the scenario for the UK under the terms of the transition being negotiated as part of the Withdrawal Agreement (European Commission 2018f).

While this would in all likelihood provide certainty for employment protections and ensure a 'level playing field' between the UK and the EU, it is unlikely to be sustainable for the UK-EU future partnership, given the UK government cannot yet know the contents of future EU legislation on employment protections. Without some mechanism for confirming or rejecting the application of new EU employment legislation to the UK, it is hard to see the UK signing up to a 'common rulebook' that would require it to follow all future EU employment legislation, regardless of its content, or run the risk of bringing down the agreement in its entirety.

At the other end of the spectrum, the UK could have far greater flexibility to adopt future EU employment legislation. Under the most flexible arrangement, once EU legislation was introduced the UK would be encouraged to adopt similar rules, but would be under no obligation to follow suit. However, without any penalties for failing to align the UK's legislation, there would be a significant likelihood of legislative divergence, creating an imbalanced playing field for trade. Such an approach may therefore risk both an effective 'level playing field' and the maximal protection of employment rights in the UK.

An intermediate option is outlined in the government's White Paper for certain parts of the UK-EU agreement, such as state aid rules (DExEU 2018a). This proposal, based on similar provisions in the EEA Agreement, would allow for the possibility of divergence in the case of new EU legislation relevant to the 'common rulebook', but with proportionate consequences for the UK if divergence in fact took place. The White Paper does not extend the 'common rulebook' to employment protections, but the mechanism it proposes is nevertheless instructive.

The process outlined in the White Paper would take place through a joint UK-EU committee. Members of the committee would update each other about any forthcoming UK or EU proposals relating to the agreement on the future relationship. The committee would discuss whether the rule change was in scope

of the agreement. Where a rule change made by the EU related to an area of the 'common rulebook', the joint committee would discuss whether to update the agreement to reflect the new rule.

In instances where the joint committee disagreed over whether the rule should be incorporated or not into the UK-EU relationship, the joint committee would seek to explore alternative ways of resolving the disagreement, including whether to recognise each other's legislation as 'equivalent' – ie not identical in substance but sufficiently similar to satisfy both sides. If no agreement was reached after a specific period, then 'rebalancing measures' could be introduced – for instance, financial penalties. Finally, if still no resolution could be found, then the relevant parts of the agreement could be suspended. It is unclear how widespread the extension would be, but in the case of employment protections, which are typically considered 'horizontal' measures that cut across various parts of the economy, it is likely that this suspension would be wide-ranging. The text in the White Paper is notably similar to Article 102 of the EEA Agreement, and has parallels with the approach outlined in IPPR's 'shared market' proposal (EFTA 2016; Kibasi and Morris 2017).

Such an approach could be a sensible framework for a 'common rulebook' on employment protections. It would allow for both a mechanism for discussing new employment legislation and a process of decision-making on the part of the UK government over whether to adopt the legislation. At the same time, there would be material consequences for any legislative divergence. This would encourage the government to maintain a robust 'level playing field' and strengthen UK employment protections in line with developments from the EU.

One way of bolstering this model would be to allow for the involvement of civil society actors in the discussion phase of new employment legislation. The future partnership agreement could, for instance, require the UK-EU joint committee to consult with social partners before reaching a decision on whether a new piece of employment legislation should be incorporated into the 'common rulebook' on employment protections. This would allow social partners to input their views into the process of decision-making by the joint committee.

SUMMARY

The following table summarises the findings from this chapter, highlighting the three options we have discussed and their relative strengths for the protection of workers' rights.

The analysis suggests that, under a 'high-integration' future relationship, where the UK continues to have close trade ties with the EU, the most robust approach would be a 'common rulebook' on employment rights. This 'common rulebook' would have in its scope all areas of the EU employment acquis and would be governed by a supranational UK-EU court and a supervision authority. (Alternatively, it could be governed via docking to the EFTA court if a UK-EU court proved impossible to negotiate). The 'common rulebook' could also be complemented by an enhanced non-regression clause, which would help to ensure the UK government did not lower its own domestic employment regulations below current levels.

We recognise, however, that in the scenario of a 'low-integration' future relationship, where the UK and the EU have weak trade ties, in practice it is unlikely for the UK and the EU to sign up to a 'common rulebook' approach. The EU will not expect the UK to fully harmonise and update its employment legislation under this scenario, given there will be greater trade barriers in place between the two parties. In these circumstances, we therefore propose an agreement to an 'enhanced' non-regression clause, with a broad scope – via a list of commitment to all EU-derived employment legislation – as well as robust governance arrangements – via a supranational court, which interprets legislation in line with the CJEU.

TABLE 3.1

Options for a UK-EU 'level playing field' on employment protections post-Brexit

Options	How wide is the scope?	How robust is the governance?	How is future legislation treated?
Option 1: standard non-regression clause	Limited to where lowering of employment standards encourages trade and investment	Very weak: enforced domestically and dispute resolution managed through consultations; as a last resort a 'panel of experts' can issue non-binding recommendations	No updating of agreement in line with future legislation
Option 2: 'enhanced' non-regression clause	Wider scope via: (i) outcomes-based approach (based on impacts of deregulation on trade and investment, rather than intentions of deregulation) (ii) including all instances of lowering employment standards, not simply where it impacts on trade and investment (iii) list-based approach where relevant EU-derived employment legislation is listed in an annex to the agreement	Stronger governance procedures via: (i) ad hoc arbitration panel that can make binding decisions and issue sanctions (ii) third party referral system to allow individuals, trade unions and other interested parties to make complaints about the enforcement of the agreement (iii) a supranational court that interprets the agreement in line with the CJEU	No updating of agreement in line with future legislation
Option 3: 'common rulebook'	Wide scope: typically through a list-based approach where relevant EU-derived employment legislation is listed in an annex to the agreement (but no reference to lowering of purely domestic legislation)	Stronger governance procedures via: (i) ad hoc arbitration panel that can make binding decisions and issue sanctions (ii) third party referral system to allow individuals, trade unions and other interested parties to make complaints about the enforcement of the agreement (iii) a supranational court that interprets the agreement in line with the CJEU	Agreement updates in line with future legislation: this can be automatic or can allow for a process of consultation and decision-making; where there is disagreement over the incorporation of new rules into the agreement, this can trigger sanctions (eg partial suspension of the agreement)

CONCLUSION

In this briefing we have set out the available options for the UK and the EU to agree a 'level playing field' on employment protections after Brexit. While the broad principle of protecting workers' rights is straightforward to grasp, there are in fact a range of complex issues in translating this principle into a meaningful agreement. The three key challenges are: the scope of the 'level playing field'; the procedures for governing the 'level playing field'; and whether there are any mechanisms in place for updating the agreement over time as EU employment legislation evolves.

There are of course many arguments for and against different versions of the 'level playing field' on employment protections. Some might want the UK to have greater flexibility in its employment legislation outside the EU, because they believe it could boost the UK's economic competitiveness and save costs for business. Others might want a deeply integrated economic relationship with the EU after the UK leaves, and so would prefer to keep the UK's legislation as close as possible to the EU's in return for a good deal on EU market access.

But putting these arguments to one side, our analysis has simply assessed the different options with respect to how they will best protect EU-derived employment rights after Brexit.

Our assessment has found that the best protections would be secured through a 'common rulebook' approach, which has the widest possible scope via simply listing all relevant EU employment directives in the annex to the UK-EU agreement. The most robust governance mechanisms would be guaranteed through a supranational court and supranational supervision authority, which would allow for individual workers to make complaints and thereby help them to enforce their rights. Finally, the 'common rulebook' would allow the agreement to be updated over time to reflect new EU-derived employment legislation. Combined, this package of scope, governance and updating arrangements would help to secure the most robust and sustainable 'level playing field' on employment protections between the UK and the EU.

We recognise, however, that this arrangement is most plausible in the case of a 'high-integration' future relationship, where there are few barriers to trade between the UK and the EU. In the case of a 'low-integration' future relationship – where there are greater barriers to trade between the two parties – it is less likely to be agreed by either party. Under these circumstances, the most plausible and robust option is therefore an 'enhanced' non-regression clause on employment protections. This clause would contain stronger requirements than a typical non-regression clause, including a broader scope and stronger governance arrangements.

As recently set out in IPPR's Commission on Economic Justice, there is both a strong moral and economic case for extensive employment protections (IPPR 2018). Not only do these rights offer greater security and conditions for workers; they can also unleash productivity gains by encouraging employers to invest in technologies and skills. In this report, we have found that, inside or outside of the EU, there are ways for the UK to continue to maintain – and indeed improve upon – its current suite of worker protections, in order to meet its wider objectives for economic growth and justice.

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