Institute for Public Policy Research

BRIEFING

NEGOTIATING THE LEVEL PLAYING FIELD

Marley Morris

March 2020

ABOUT IPPR

IPPR, the Institute for Public Policy Research, is the UK's leading progressive think tank. We are an independent charitable organisation with our main offices in London. IPPR North, IPPR's dedicated think tank for the North of England, operates out of offices in Manchester and Newcastle, and IPPR Scotland, our dedicated think tank for Scotland, is based in Edinburgh.

Our purpose is to conduct and promote research into, and the education of the public in, the economic, social and political sciences, science and technology, the voluntary sector and social enterprise, public services, and industry and commerce.

IPPR
14 Buckingham Street
London
WC2N 6DF
T: +44 (0)20 7470 6100
E: info@ippr.org
www.ippr.org
Registered charity no: 800065 (England and Wales),
SC046557 (Scotland)

This briefing paper was first published in March 2020.

The progressive policy think tank

CONTENTS

ABOUT THIS PAPER

This report fulfils IPPR's educational objective by publishing research to inform the public and civil society on the 'level playing field' aspect of the UK-EU negotiations.

ABOUT THE AUTHORS

Marley Morris is associate director for immigration, trade and EU relations at IPPR.

ACKNOWLEDGEMENTS

I would like to thank The Legal Education Foundation for their support for this research project, without which this briefing would not be possible. I am particularly grateful to Swee Leng Harris, whose advice and feedback have been invaluable. My thanks also go to Emily Lydgate at the University of Sussex and Phoebe Griffith at IPPR for their feedback on early drafts. Finally, I would like to thank the speakers and participants at an IPPR roundtable held in January for their contributions and insights, which helped to develop the thinking in this paper.

The Legal Education Foundation

Download
This document is available to download as a free PDF and in other formats at:
http://www.ippr.org/research/publications/level-playing-field

Citation
If you are using this document in your own writing, our preferred citation is:
Morris M (2020) *Negotiating the level playing field*, IPPR.
http://www.ippr.org/research/publications/level-playing-field

INTRODUCTION

The UK and the EU are embarking on the next stage of the Brexit negotiations to determine their future trading relationship. Both sides are looking to agree a free trade agreement to guarantee no tariffs and quotas on traded goods. As the quid pro quo for a tariff-free, quota-free deal, the EU has made clear its expectation of a 'level playing field' for trade in order to prevent the UK from gaining an unfair competitive advantage over the EU. This includes an agreement on areas such as state aid and competition policy, taxation, environmental protections, and labour and social standards.

For the UK government, such level playing field measures will prove difficult to accept, given prime minister Boris Johnson's insistence that the future agreement cannot include any requirement for the UK to continue to follow EU rules or be subject to the jurisdiction of the Court of Justice of the European Union (CJEU). The stage is therefore set for a major stand-off between the UK and the EU on the scope and enforcement of the 'level playing field' for post-Brexit trade.

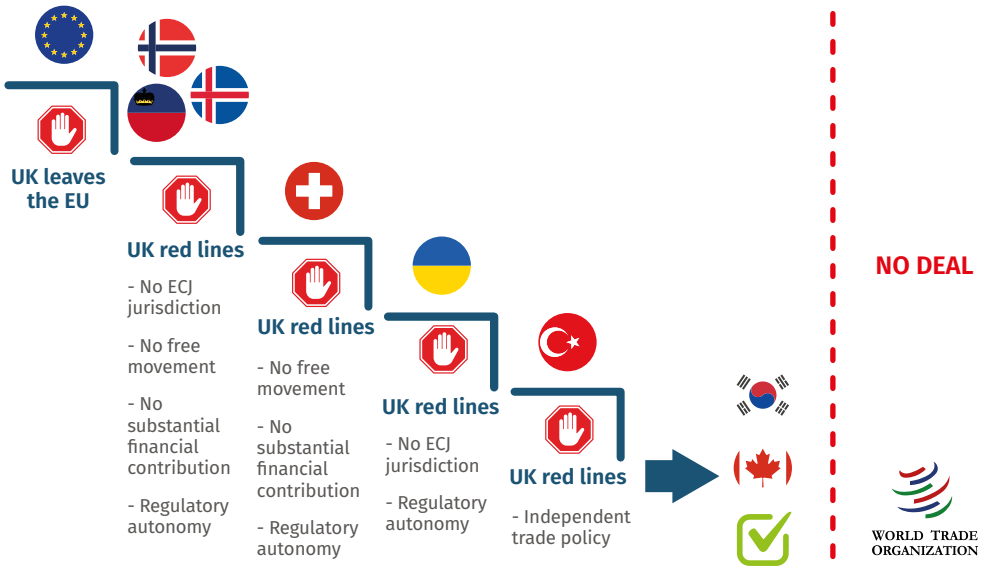
This briefing provides an overview of the level playing field – including a discussion of its purpose, content, and governance. It aims to explain the core elements of the level playing field, as well as the key points of tension and potential compromise. The briefing concludes with an analysis of how the text of the level playing field should be designed to make it accessible and effective, in order to ensure it is interpreted consistently by both sides and does not give rise to legal uncertainty.

1. WHY HAVE A LEVEL PLAYING FIELD?

In the negotiations with the EU on the future relationship, the UK government has set out a number of red lines: it wants to leave the EU to regain regulatory autonomy, pursue an independent trade policy, and end the jurisdiction of the CJEU, the EU's highest court. Given these objectives, the parameters of the negotiations on the future relationship are limited: the default outcome is a 'Canada-style' trade agreement. Such a deal involves minimal alignment of rules – the parties are free to pursue their own regulatory regimes – but involves far greater trade barriers compared to continued membership of the single market. Figure 1.1 illustrates, from the European Commission's perspective, how the UK's red lines point towards a Canada-style deal.

FIGURE 1.1: 'BARNIER'S STAIRCASE'

The UK's red lines mean that the only deal possible is a 'Canada-style' free trade agreement



Source: EC 2017

In the context of negotiating a 'Canada-style' agreement, the EU has offered a tariff-free, quota-free arrangement for all goods. While this would not mean frictionless trade – because it would not resolve numerous regulatory and customs barriers for businesses – it would avoid the introduction of tariffs on trade in goods. Unless a deal is agreed, the UK and the EU will trade on WTO terms and the EU will be obliged to impose the same tariffs on goods imported into its territory as it does for other WTO countries without preferential trade agreements. These tariffs (known as MFN or 'most favoured nation' tariffs) vary significantly and can be extremely high for certain categories of goods – for instance, EU average MFN tariffs on dairy products and sugar are 54 and 31 per cent respectively (House of Lords 2017). Most free trade agreements remove many tariffs and quotas but

it is rare for an agreement to get rid of them altogether. For the UK, then, the elimination of all tariffs and quotas is a critical benefit in its trade negotiations with the EU.

Yet the EU has been clear that it will not sign up to a tariff-free, quota-free agreement without corresponding commitments from both parties to ensure a 'level playing field' for trade. The EU member states are concerned that, once it has left the EU and is no longer subject to EU legislation, the UK's size, geographical proximity and close trade links could pose a particular challenge for fair competition. For instance, member states worry that the UK will attempt to gain an unfair competitive advantage over the EU by deregulating its economy or that it will unfairly attract investment by offering firms lavish subsidies or tax breaks. For member states, it is therefore unacceptable for the UK to find itself entirely free from the EU's competition and regulatory structures while at the same time continuing to have tariff- and quota-free access to EU markets.

There are also arguments for maintaining a level playing field from the UK's perspective. For many campaigners, the EU has played an important role in upholding high labour and environment standards in the UK and there are advantages to enshrining these high standards in international law (Morris and Emden 2018; Morris 2019a). Indeed, the vast majority of the public – including both remain and leave supporters – back maintaining these high standards after Brexit (Morris 2018).

However, for the UK government the EU's proposals for a level playing field pose a concern. The UK is clear that it intends to have full regulatory autonomy and cannot countenance being bound by EU rules after the end of the transition period. In prime minister Boris Johnson's words, the new partnership between the UK and the EU must not involve "regulatory alignment, any jurisdiction for the CJEU over the UK's laws, or any supranational control in any area" (Johnson 2020). This does not mean that the government necessarily plans to diverge from EU legislation in practice; instead, it wants the freedom to decide for itself. The challenge for the UK and the EU is how to balance the UK's desire for sovereignty with the EU's concerns that the UK will use its new-found powers to gain an unfair competitive advantage over its neighbours.

The UK and the EU came to an agreed form of wording on the level playing field in the political declaration, their joint roadmap for the future relationship. In the political declaration, the UK and the EU agreed that:

> ***"Given the Union and the United Kingdom's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, encompassing robust commitments to ensure a level playing field … To that end, the parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters."***
> (DExEU 2019)

The level playing field therefore primarily relates to horizontal issues – that is, policies that cut across multiple sectors – rather than specific sectoral requirements, such as those relating to agriculture and fisheries, data flows, or financial services.[1] Moreover, the level playing field does not directly relate to product standards and an agreement on level playing field conditions would not unlock market access on a sectoral basis. Instead, an agreement on the

1 The EU has asked, however, for some additional level playing field conditions in the specific areas of air, road and maritime transport, as well as electricity and gas (Council 2020).

level playing field would help to facilitate the negotiations on a tariff-free, quota-free trade deal by offering reassurances that neither party will seek an unfair competitive advantage over the other (Lowe 2020).

As identified in the political declaration, there are four main areas of policy where the UK and the EU have agreed to negotiate level playing field commitments. We consider the rationale for each area in turn.

STATE AID AND COMPETITION POLICY

The foremost priority of the EU in the level playing field negotiations is state aid and competition policy. The EU's state aid and competition rules are an important part of the EU treaties and decisions on state aid compatibility are a core competence of the European Commission. Their aim is to ensure a fair competitive environment across the bloc – for instance, by preventing damaging subsidy races between member states. The EU's state aid rules are relatively robust and comprehensive when compared to the WTO baseline: they are based on a wide definition of state aid with broad sectoral coverage (including both goods and services) and they are strictly enforced through the European Commission and the CJEU. State aid must be notified to the commission ahead of time, unless it falls under an exemption, and the commission has the power to order member states to recover state aid where it has been unlawfully granted and is incompatible with EU state aid rules (Verouden and Colomo 2019).

Given the robust rules in this area and their importance for fair and open competition, the EU is especially concerned that the UK could diverge from these rules after Brexit to member states' disadvantage (EC 2018). For instance, the UK could offer subsidies or tax breaks to particular firms in an attempt to outbid its European neighbours and attract foreign investment.

One area of particular sensitivity is the EU's regional aid rules. Currently the UK is subject to EU rules concerning how to use aid to support specific regions of the country. There is an increasing debate in the UK about 'levelling up' the country, given the significant economic disparities between nations and regions. But if the UK were to flout EU rules after Brexit in a bid to address regional inequalities – for instance, by providing subsidies to attract business investment towards regions in the North and the Midlands at the expense of more disadvantaged regions of the EU – then from the EU's perspective this would pose a risk to fair competition (Verouden and Colomo 2019).

ENVIRONMENT AND CLIMATE CHANGE

Another priority for the EU in developing a level playing field is the environment and climate change. The EU's environment and climate acquis is considerable and ever-evolving – covering areas such as air quality, waste management, water protection, biodiversity, chemicals, noise pollution, emissions trading, carbon capture and storage, and fuel quality. This legislation involves a complex interplay between overall target-setting, national action plans, regular reporting and monitoring mechanisms, and specific rules and procedures – eg on the manufacturing of different products. The European Commission plays an important role in monitoring and enforcing this environmental legislation (Morris and Emden 2018).

The EU is therefore concerned that the UK may seek to remove EU environmental regulations after Brexit in an attempt to boost its competitiveness. In the view of some in the UK, the EU's environmental legislation places particular costs on businesses, and so weakening this legislation could place UK business at an advantage compared to its EU counterparts. The EU is concerned that this strategy could succeed in undercutting member states and encourage a 'race to the bottom' on environmental protections (EC 2018).

There is an additional consideration in this area: given its proximity to the EU, there is a risk that a deregulated UK could impose environmental costs on other European countries, such as through cross-border pollution. Relatedly, the EU also conceives this element of the level playing field as complementing broader joint commitments on global sustainability and cooperation on tackling climate change (Council 2020).

LABOUR AND SOCIAL STANDARDS

Just as the EU has prioritised environmental standards in its discussions of the level playing field, it has also consistently referenced labour and social standards. The EU's social acquis is narrower than the corresponding body of environmental legislation, but nevertheless contains some landmark areas of policy, including legislation on working time and holiday pay, equal treatment and discrimination, maternity and parental leave, information and consultation, part-time and fixed-term workers' rights, and occupational health and safety. While the European Commission plays less of an oversight role in comparison to environmental policy, the EU legal architecture – including the principle of direct effect and the adjudication of the CJEU – have significantly influenced the UK's direction on employment rights over the past few decades (Morris 2019a).

As with environmental protections, the EU is alive to the possibility that the UK will embark on a process of deregulation on labour standards in order to gain a competitive advantage over its neighbours. The UK already has relatively low average labour costs compared to its western European counterparts; by lowering employment protections, it could attempt to lower its labour costs further and thereby try to undercut the EU (Morris 2019b). In particular, from the EU's perspective there are risks that the UK could weaken information and consultation rights in an attempt to lower costs for businesses, or that it could limit collective bargaining rights in order to drive wages down. The commission has also highlighted the possibility of the UK setting up export processing zones (EPZs) (a type of free port) where lower levels of labour protection apply. The EU worries that these practices could lead to a 'race to the bottom' (EC 2018).

TAXATION

The EU's body of legislation on taxation is relatively limited compared to the other areas of the level playing field. For the most part, taxation is a member state competence. However, there are some areas where the EU has legislated on taxation. Of particular relevance are the measures introduced to tackle tax avoidance and evasion. For instance, the EU's recent anti-tax avoidance directive aims to address aggressive corporate tax planning and includes rules on profit shifting, exit taxation, and 'hybrid mismatches' (business arrangements designed to exploit how tax policies differ across multiple jurisdictions) (EC 2016a).

The EU is alert to the risk that after Brexit the UK may use tax measures to attract investment and gain a competitive advantage over member states. In practice, though, there are limited avenues for the EU to stop this, given member states in any case have considerable autonomy over tax policy. Nevertheless, the EU hopes to come to an agreement to ensure that the UK upholds basic commitments to a fair system of corporate taxation (EC 2018).

This section has summarised the EU's rationale for pursuing a level playing field with the UK, as well as the UK's concerns about the EU's approach. In the next two sections, we will consider first the content of the level playing field – ie the precise commitments to which the UK and the EU might agree – and then how these commitments could be overseen and enforced.

2. HOW MIGHT THE UK AND THE EU AGREE SPECIFIC COMMITMENTS TO A LEVEL PLAYING FIELD?

TABLE 2.1: SUMMARY OF EU AND UK POSITIONS ON LEVEL PLAYING FIELD

Level playing field	EU position	UK position	Scope for compromise
Competition and state aid	Dynamic alignment with EU rules on state aid; and mirroring of EU rules on competition	Commitment to maintain effective competition laws, to notify each other of subsidies, and to consult on potentially harmful subsidies, but no alignment with EU rules	Low
Environment and climate change	Robust non-regression clause: commitment to not lower level of protection below level provided by minimum EU standards at end of transition period Possible equivalence clause: commitment to corresponding levels of protection over time	Non-regression clause: commitment to not lower level of protection provided by own standards to encourage trade or investment	Medium-high
Labour and social standards	Robust non-regression clause: commitment to not lower level of protection below level provided by minimum EU standards at end of transition period Possible equivalence clause: commitment to corresponding levels of protection over time	Non-regression clause: commitment to not lower level of protection provided by own standards to encourage trade or investment	Medium-high
Taxation	Commitment to good governance and curbing harmful tax measures, and alignment with specific EU legislation on taxation	Commitment to good governance but no alignment with EU rules	Medium

Source: Author's analysis

Both the UK and the EU have supported the principle of upholding fair and open competition and high labour and environmental standards. So why is the level playing field likely to be such a controversial area of the negotiations? The challenge is how commitments to a level playing field are defined in practice. The EU wants to agree specific 'substantive provisions' as part of the level playing field. This goes beyond a broad promise to ensure both parties treat each other fairly; rather, it encompasses precise commitments relating to particular laws and standards.

There are broadly four categories of commitments that could be included as part of the level playing field.

- **General principles:** the UK and the EU could agree to uphold broad principles on issues relating to competition policy, taxation and labour and environmental protections – for instance, commitments to international frameworks and standards.
- **Non-regression:** the UK and the EU could commit to at least maintaining current levels of protections in certain areas (eg in relation to environmental or labour standards). This does not necessarily require aligning with each other's rules – in broad terms, it simply means that both sides commit to not weakening current levels of protection.
- **Equivalence:** the UK and the EU could commit to maintaining corresponding levels of protections now and in future. Again, this would not require the UK to follow EU rules. Instead, in practice it would require the UK to uphold at least the same level of protections as the EU over time, though the UK could achieve this outcome through different means.
- **Alignment:** the UK and the EU could commit to following the same rules in specified policy areas. In practice, this would mean that the UK continues to follow certain areas of EU law. This alignment could also be 'dynamic' if both sides commit to updating the agreement to keep pace with EU legislation over time.

The political declaration explains that the extent of the proposed level playing field commitments will be commensurate to the scope and depth of the economic partnership between the UK and the EU. That is, the closer the future relationship, the stronger the level playing field commitments (DExEU 2019).

Even so, there are some baseline commitments which the EU is likely to expect from any comprehensive free trade agreement that guarantees no tariffs and no quotas. For instance, the political declaration states that:

> ***"The parties should in particular maintain a robust and comprehensive framework for competition and state aid control that prevents undue distortion of trade and competition; commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices; and maintain environmental, social and employment standards at the current high levels provided by the existing common standards."***
> (DExEU 2019)

While both sides agreed to the wording of the political declaration, they appear to have interpreted this wording very differently. The EU's opening position in the negotiations – as set out in the EU negotiating directives – suggests that it wants strict controls in a number of areas, going beyond what is normally expected in a typical free trade agreement. This is based on a similar approach taken by the EU in the original version of the Irish Protocol negotiated by Theresa May's government in 2018 – ie the so-called 'backstop'. This version of the Irish Protocol removed all tariffs and quotas on UK-EU trade as part of the proposed UK-EU customs territory, and so included specific level playing field commitments as the quid pro quo for a tariff-free, quota-free arrangement (DExEU 2018). The latest version of the EU's negotiating directives suggest that the EU wants to build on this and indeed seeks to go even further – referencing the need for the UK and the EU to not just uphold common high standards, but also to uphold "corresponding high standards over time" (Council 2020).

In response to the EU's position, the UK has stated that it will not be a 'rule-taker' and that it does not want to be restricted from making its own legislation, even if in practice it chooses not to diverge from the EU. In reference to the level playing

field, prime minister Johnson in his ministerial statement on the UK's proposed approach to the negotiations outlined the following position:

> ***"The government will not agree to measures in these areas which go beyond those typically included in a comprehensive free trade agreement. The government believes therefore that both parties should recognise their respective commitments to maintaining high standards in these areas; confirm that they will uphold their international obligations; and agree to avoid using measures in these areas to distort trade."***
> (Johnson 2020)

Drawing on both the EU and UK opening negotiating documents – as well as the earlier EU-UK agreement on the level playing field in the original Irish Protocol – we set out how both sides will approach each of the main areas of the level playing field.

STATE AID AND COMPETITION POLICY

The EU is likely to take the most robust position in the area of state aid and competition policy. The original Irish Protocol took an approach to state aid based on dynamic alignment – that is, it required the UK to maintain EU rules on state aid and competition. This included specific treaty provisions – eg Article 107 TFEU, which sets out the rules prohibiting state aid – as well as secondary legislation such as the General Block Exemption Regulation and a range of EU guidelines on different types of state aid. Similarly, the protocol included provisions of competition policy that were largely copied and pasted from the EU treaties (DExEU 2018).

The EU's negotiating directives indicate that it plans to pursue a similar approach for the future economic partnership: they state that the level playing field should include the "application of Union state aid rules to and in the United Kingdom". They also refer to rules to prohibit anticompetitive behaviour to the extent that this affects UK-EU trade, as well as rules to prevent the distortion of competition by state-owned enterprises, monopolies, and enterprises granted special rights or privileges (Council 2020). In effect, the EU aims to ensure that its rules on state aid and competition will continue to apply to the UK in future.

For its part, the UK has adopted a position based on the approach taken in other EU free trade agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA). The UK's negotiating guidelines propose broad commitments on maintaining effective competition laws, without requiring any alignment or copying of rules. On state aid, or subsidies, the UK proposes agreeing commitments on transparency. This would involve both parties notifying each other of any subsidies granted every two years. In addition, the UK paper suggests including a right to request consultations on subsidies that could harm either party (Prime Minister's Office 2020). This appears similar to provisions in other EU FTAs – eg in CETA, there is a consultation mechanism to discuss subsidies that could damage the interests of Canada or the EU, with the ambition of eliminating or minimising any adverse impacts (EC 2014). However, these commitments are very different from the strict alignment envisaged by the EU's negotiating position.

Indeed, during the 2019 general election the Conservatives raised proposals to reform EU state aid rules after Brexit (Conservative Party 2019). More recently, prime minister Johnson's ministerial statement references plans to develop an independent competition and subsidies policy, distinct from the EU's regime (Johnson 2020). On the issue of state aid, then, the UK and the EU are in direct conflict.

However, it is important to note that the UK-EU withdrawal agreement (both the original and revised version) includes specific provisions on state aid for Northern Ireland. According to the withdrawal agreement, the UK must continue to follow EU rules on state aid relating to any state aid measure that affects trade between Northern Ireland the EU. Moreover, these rules will be supervised and enforced directly by the European Commission and the CJEU. The UK has therefore already agreed to follow state aid rules for trade respecting Northern Ireland – a significant concession in the context of the wider level playing field (Peretz 2018).

ENVIRONMENT AND CLIMATE CHANGE

In the original Irish Protocol, the EU and the UK agreed a non-regression clause on environmental protections. This non-regression clause was markedly broad in scope, ensuring that the UK and the EU continued to uphold at least the same level of environmental protections as that provided by minimum EU standards at the end of the transition period.[2] The non-regression clause committed to upholding levels of protection in a number of specific areas of environmental policy, including environmental impact assessments, industrial emissions, air quality, nature conservation, waste management, water protection, chemicals, and climate change (DExEU 2018). However, this did not mean that the UK had to adhere to the current EU acquis in all these areas; instead, it could achieve (at least) the same level of protections through different means (Lydgate 2018).

In addition to the central non-regression clause, the Irish Protocol also included a number of supplementary provisions. These included promises to uphold previously negotiated international agreements, commitments to general principles – such as the precautionary principle and the 'polluter pays' principle – and proposals to agree minimum commitments in specified areas – such as on the emissions of certain atmospheric pollutants. Finally, it also ensured that the UK would introduce a carbon pricing scheme at least as effective and broad in scope as the EU's emissions trading system (DExEU 2018).

The EU's negotiating directives indicate that the EU plans to take a more robust approach in the negotiations on the future economic partnership, asking for everything in the original Irish Protocol alongside some additional commitments. They propose a non-regression clause covering the same range of areas of environmental policy, as well as the additional area of food safety. In addition to this non-regression clause, the EU has suggested that it wants the UK and the EU to maintain "corresponding" levels of environmental protections over time. It has made clear that the benchmark for achieving corresponding levels of protections should be the EU's own standards. The principle underpinning this proposal is that in future the UK should not fall too far behind the EU in its environmental protections and thereby gain an unfair competitive advantage. This does not mean that the UK would have to align to EU rules; instead, it appears to mean that the UK's level of environmental protections would be expected to not fall too far below EU levels in future (and in any event should not fall below current EU levels). In effect, UK standards should at a minimum remain broadly 'equivalent' to EU standards over time.

The directives also place a greater emphasis on the fight against climate change, separating this from the environmental provisions and including it as a separate section of the level playing field. Specifically, the directives raise the possibility of the UK linking with the EU's emissions trading system and suggest extending non-regression into other areas of the climate acquis not covered by carbon pricing, with a particular reference to climate targets (Council 2020).

2 The non-regression clause in fact refers to the "common standards applicable within the Union and the United Kingdom at the end of the transition period", but as the UK must abide by minimum EU standards until the end of the transition period, this is in effect equivalent to minimum EU standards.

In its negotiating document, the UK has proposed its own approach to environmental protections. There are some areas of agreement with the EU: the UK has stated that it is willing to make commitments on reaffirming international agreements and is open to considering linking with the EU's emissions trading system. In principle, the UK is also open to agreeing a non-regression clause, given this would not require regulatory alignment between the UK and the EU (Prime Minister's Office 2020). Moreover, non-regression clauses are a common part of most modern free trade agreements – the US has also put forward proposals for non-regression clauses on labour and environmental standards in its negotiating objectives for a trade agreement with the UK (USTR 2019).

The UK has, however, objected to the EU's proposal on environmental non-regression. Rather than following the EU's approach, it has instead proposed negotiating a commitment to not lower the level of protections provided by each party's own environmental laws in order to encourage trade or investment (Prime Minister's Office 2020). This is not necessarily a minimal offer from the UK – indeed, it is somewhat stronger than a typical non-regression clause because it aims to prevent all forms of deregulation. (By contrast, the environment non-regression clause in CETA states that neither party shall "waive or otherwise derogate from" or "fail to effectively enforce" its environmental rules in order to encourage trade and investment (EC 2014).) But the UK's proposal is nevertheless far weaker than the EU's.

There are four main differences between the approach taken by the UK and the EU. First, the UK's proposed non-regression clause is less comprehensive: while the EU wants the UK to maintain the level of environmental protection provided by "law, regulations and practices", the UK's non-regression clause only refers to "environmental laws". Second, the UK's approach to non-regression is far less precise: while the EU wants commitments in specific areas of policy, the UK refers to no such detailed list. Third, the UK's proposed non-regression clause is more limited in scope, only applying to the extent that one side or the other is taking action to encourage trade or investment. Finally, while the UK only refers to non-regression, the EU appears to also be potentially seeking for the UK and the EU to uphold corresponding levels of protection over time.[3]

Despite these differences, there is nevertheless potential scope for compromise between the two sides, given the EU is not asking the UK to align with EU law in this area. Indeed, the non-regression clause in the original Irish Protocol offers a potential landing zone: weaker than the approach taken by the EU in the latest negotiating directives but stronger than the limited approach taken by the UK.

LABOUR AND SOCIAL STANDARDS

In the original Irish Protocol, the UK and the EU agreed a relatively robust non-regression clause, similar to the text of the environmental provisions in the agreement. As with the environmental non-regression clause, the non-regression clause on labour and social standards aimed to prevent all forms of backsliding from the level of protection provided by minimum EU standards at the end of the transition period and included in its scope all forms of deregulation, not simply

3 It is worth noting that the European Commission's draft negotiating directives suggest that the EU also wants to include more 'standard' non-regression clauses in the future economic partnership alongside its more robust bespoke versions. These non-regression clauses – relating to labour, environmental and climate protections – would apply in the case where the UK and the EU have higher levels of protection compared with the minimum levels provided by EU standards at the end of the transition period. According to these non-regression clauses, where the UK has a level of protection higher than the minimum, it would be prohibited from lowering it from this higher level in order to encourage trade and investment. To take one example in the field of labour rights, the UK would be prohibited from lowering its minimum wage – a UK policy exceeding the minimum level of protection currently provided by EU standards – to encourage trade and investment.

those which may have an impact on trade or investment. It also referred to maintaining the level of protection "provided for by law, regulations and practices", in order to capture the implementation of labour law as well as the law itself.

This non-regression clause, however, had a slightly different scope than its environmental counterpart. The list of areas covered was less comprehensive – including "fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring". This was, however, counterbalanced by a general reference to not reducing current levels of protection in the area of labour and social protection. This reference was presumably meant as a catch-all for other areas of labour and social policy not covered by the relatively short list (DExEU 2018).

Alongside the non-regression clause, the labour and social standards section of the original Irish Protocol also included some more general provisions, including commitments to promote social dialogue between workers and employers and to implement formerly ratified international laws (eg International Labour Organisation (ILO) conventions and the Council of Europe Social Charter). There were not, however, provisions equivalent to the precise target-based commitments in the environment section of the agreement (ibid).

According to the EU's negotiating directives, the EU will now ask for somewhat stronger commitments from the UK on social and employment standards. As well as seeking a non-regression clause, the EU appears to be looking for an agreement for the UK to uphold levels of protection corresponding at least to EU levels over time. In other respects, however, the proposals are similar to those in the original Irish Protocol. The EU's approach here appears to be considerably stronger than its normal approach to labour provisions in previous free trade agreements, while at the same time somewhat weaker than its approach to environmental provisions in the current negotiations. This perhaps reflects member states' greater concerns about the risks of deregulation in environmental policy for fair and open competition (Council 2020).

The UK has proposed a different approach to labour and social policy, stating that there should be reciprocal commitments to not weaken the level of protection provided by labour laws and standards as a means of encouraging trade or investment. This is similar to the non-regression clause for labour rights contained in CETA (though it is somewhat more robust given it refers to any form of weakening rather than simply derogation). The UK has also said it is willing to commit to general provisions on cooperation and ILO principles. As with environmental protections, there are key differences between the UK and the EU approach: the UK's non-regression proposal is less precise, only applies when regression can be linked to encouraging trade or investment, and only relates to existing standards rather than future equivalence of standards over time (Prime Minister's Office 2020).

There is therefore currently significant distance between the UK and the EU positions on labour and social protections. But as with environmental protections, there is potentially room for compromise. A robust non-regression clause that requires both parties to maintain at least the existing level of protection provided by minimum EU standards could be a sensible middle ground.

TABLE 2.2: EU AND UK POSITIONS ON LABOUR AND ENVIRONMENTAL NON-REGRESSION CLAUSES IN THE LEVEL PLAYING FIELD

	EU position	UK position
What methods of protection are in scope?	Laws, regulations and practices	Laws and/or standards
What areas of policy are in scope?	Detailed list of policy areas	Vague reference to labour and environmental laws/standards
When is non-regression prohibited?	All instances	Only when encouraging trade or investment
What is the reference point for non-regression?	Minimum EU standards at end of transition period	Own standards
Does position extend beyond non-regression?	Yes – seeking to uphold corresponding levels of protection over time	No

Source: Author's analysis

Note: EU position only refers to the main non-regression clause in their negotiating guidelines – see footnote 3 for details of their proposed additional non-regression clause

TAXATION

The EU is planning to take a mixed approach in the area of taxation, with the aim of combining provisions on alignment on specific legislation with broader commitments to general principles. In the original version of the Irish Protocol, the UK and the EU agreed commitments to the principles of good governance on taxation, including commitments to particular global standards. They also agreed for the UK to maintain a small number of specific areas of EU tax legislation, including legislation on information exchange on tax issues and on tackling tax avoidance practices. Finally, they agreed commitments on curbing harmful tax measures, including upholding the EU's Code of Conduct for Business Taxation (DExEU 2018).

Based on their negotiating directives, the EU will follow broadly a similar approach on taxation in this stage of the Brexit negotiations (Council 2020). In some areas, the EU may ask for more than previously, given the guidelines now propose for the UK and the EU to maintain "corresponding high standards over time". For instance, where in the original Irish Protocol the EU asked for the UK to maintain specific EU laws, it may now ask for the UK to update these laws over time in line with parallel developments in the EU.

On the other hand, the UK has said that it is willing to agree commitments to general principles on good governance, but it will probably seek to water down the proposals for the UK to follow specific areas of EU law, given this conflicts with the UK's position of regulatory autonomy (Prime Minister's Office 2020). However, there is most likely greater scope for compromise in this area than in competition and state aid policy, given any disagreement here would relate to a relatively limited area of EU law.

***

In summary, the UK and the EU are likely to find it easier to negotiate a compromise on labour and environmental standards, where the EU is not asking the UK to continue to follow EU law and where both sides could find an agreement on a robust non-regression clause. But there is a larger gap in the approaches taken by the UK and the EU on competition and state aid, where the EU wants the UK to maintain strict alignment with EU rules and the UK is looking to agree something far looser.

The scope for compromise, however, is likely to also depend on the arrangements for governing these commitments – that is, how the level playing field conditions should be overseen and enforced, and how disputes between the two sides on level playing field issues should be resolved. In the next section, we turn to this question in more detail.

3. HOW MIGHT THE LEVEL PLAYING FIELD BE GOVERNED?

TABLE 3.1: SUMMARY OF EU AND UK POSITIONS ON GOVERNANCE OF LEVEL PLAYING FIELD

Level playing field	EU position	UK position	Scope for compromise
Competition and state aid	Enforcement by domestic authorities, including independent body; European Commission oversight for state aid For disputes about state aid, role for standard dispute resolution (arbitration and sanctions possible)	Enforcement of competition law through domestic procedures For disputes relating to competition policy or to consultation on subsidies, exemption from standard dispute resolution (no arbitration or sanctions possible)	Low
Environment and climate change	Enforcement by domestic authorities, including independent body For disputes about enforcement, potential role for standard dispute resolution (arbitration and sanctions possible)	No specific enforcement requirements Exemption from standard dispute resolution (no arbitration or sanctions possible)	Medium-high
Labour and social standards	Enforcement by domestic authorities For disputes about enforcement, potential role for standard dispute resolution (arbitration and sanctions possible)	No specific enforcement requirements Exemption from standard dispute resolution (no arbitration or sanctions possible)	Medium-high
Taxation	Enforcement measures unclear For disputes about alignment with EU tax rules, potential role for standard dispute resolution (arbitration and sanctions possible)	No specific enforcement requirements Exemption from standard dispute resolution (no arbitration or sanctions possible)	Medium

Source: Author's analysis

Note: References to enforcement only relate to the UK

In order to have a meaningful level playing field between the UK and the EU, there must be a way of governing it – ie a way of making sure that both sides uphold their commitments (enforcement) and of resolving any disputes about these commitments (dispute resolution). Governance is a normal part of any trade agreement, because there generally needs to be some process for enforcing an agreement and resolving disputes between the parties about its implementation. The governance of the level playing field, however, is likely to be a controversial issue in the negotiations, because the UK is sensitive to any conditions that might impact on its sovereignty.

Before considering the governance arrangements for each element of the level playing field, it is useful to consider the general expected approach to governance for the future economic relationship between the UK and the EU. The overarching arrangements for governance are outlined in the political declaration and are based on the approach taken in the withdrawal agreement (in both the original and revised version).

The political declaration makes clear that a 'Joint Committee' made up of UK and EU representatives should be responsible for supervising the future relationship, including overseeing how the agreement is implemented, proposing updates where necessary, and managing the process of dispute resolution. In the first stage, disputes over the agreement are meant to be resolved through consultations in the Joint Committee. Where consultations fail, the Joint Committee can refer the dispute onto an independent arbitration panel (and after a certain period either party has the right to unilaterally refer the dispute to arbitration). The arbitration panel's ruling is binding on the UK and the EU. However, in the case of disputes that relate to questions of EU law, there is a further complication: because the CJEU is the final arbiter on EU law questions for the EU, the arbitration panel must refer the relevant question onto the CJEU to decide. The CJEU's interpretation of EU law is then binding on the arbitration panel (DExEU 2019).

But what happens when one of the parties refuses to comply with a ruling of the arbitration panel? The political declaration indicates there will be provisions for temporary remedies (DExEU 2019). In turn, the EU's negotiating directives provide further detail of the likely end state, referring to "financial compensation" and "proportionate and temporary measures, including suspension of its obligations" (Council 2020). Based on the text of the Withdrawal Agreement, we can expect that in the first instance the arbitration panel will be able to require the offending party to compensate the complainant with a financial payment. If they do not pay or continue to refuse to comply with the ruling, then the complainant will have the right to temporarily suspend its obligations coming from parts of any UK-EU agreement – eg by temporarily restricting market access – provided this suspension is proportionate to the size of the violation (DExEU 2018). There could therefore be significant costs for either party if they choose to violate parts of the future trade agreement.

There are expected to be further specific arrangements for the governance of the level playing field conditions in the future economic partnership. Drawing on the EU's negotiating directives and the Irish Protocol in the original Withdrawal Agreement, we can identify the EU's likely starting point on governance in each of the main areas of the level playing field:

STATE AID AND COMPETITION POLICY

The EU negotiating directives suggest that, at the first stage, the level playing field provisions on state aid should be enforced at the domestic level via an 'independent authority' – ie the UK's Competition and Markets Authority (CMA) – which should in effect replicate the functions of the European Commission in

enforcing state aid rules. The independent authority is meant to work closely with the European Commission to ensure the consistent application of EU rules on state aid (Council 2020). This approach is elaborated upon in the original Irish Protocol, which stated that the independent authority should exchange information with the commission and must consult the commission on all draft state aid decisions. Similarly, in the Irish Protocol the UK's courts and tribunals were expected to play a role in enforcing state aid rules – by, for instance, being able to review whether the independent authority had acted in line with EU law. It also gave the commission legal standing before the UK's courts and tribunals and the right to intervene in relevant state aid cases (DExEU 2018). The EU is likely to ask for similar conditions in the future agreement.

For disputes on state aid, the EU negotiating directives make clear that they should be subject to dispute settlement (Council 2020). Under the former Irish Protocol, the normal dispute resolution applied as explained above – ie there would be a first stage of consultations followed by referral to an independent arbitration panel if necessary. Moreover, given any dispute on state aid rules would relate to EU law, this could result in a reference to the CJEU. In addition to the generic dispute resolution process, the original Irish Protocol also included extra options for the EU to apply provisional remedial measures where it judged that the UK had failed to comply with EU state aid rules and that this had undermined equal conditions of competition between the UK and the EU (DExEU 2018). The EU is likely to adopt a similarly robust approach on state aid rules in these negotiations.

For competition policy, the EU negotiating directives call for "effective enforcement via a competition law and domestic administrative and judicial proceedings" (Council 2020). The original Irish Protocol included further details on enforcement: it stated that competition policy should be enforced domestically by an independent authority (ie the CMA) and that there should be cooperation between the UK and EU competition authorities. On dispute resolution, however, it took a different position than on state aid; here it stated that disputes on competition policy could only be resolved through consultations in the Joint Committee and should not be brought to arbitration. Instead, the UK was expected to enforce competition policy domestically – ie through administrative and judicial proceedings, effective remedies, and sanctions – and disputes could only be brought to arbitration when they related to the enforcement of competition policy, rather than competition policy itself. This is an approach similar to that taken in other areas of the level playing field, as discussed further below (DExEU 2018).

ENVIRONMENT AND CLIMATE CHANGE

The original Irish Protocol stated that the level playing field commitments on the environment were to be enforced at the domestic level. As with competition policy above, the UK was required to put in place appropriate administrative and judicial proceedings, effective remedies, and sanctions in order to enforce its environmental commitments. Moreover, it was required to set up an 'independent body' (or bodies) to enforce the UK's environmental obligations. The independent body was expected to have the power to investigate alleged breaches of environmental commitments by public bodies, as well as the right to bring legal action to remedy any potential breaches (DExEU 2018). The EU negotiating directives suggest that the EU wants to adopt a similar approach in the current negotiations, based on the idea of an independent body monitoring and enforcing the UK's environmental commitments at the domestic level (Council 2020).

With respect to dispute resolution, the starting point of the EU is again likely to be modelled on the original Irish Protocol. As with competition policy, the protocol excluded the environmental commitments in the level playing field from the arbitration stage of the dispute resolution process. This meant that the only

specified way of resolving disputes on the environmental non-regression clause itself was through consultations in the Joint Committee. However, disputes on the enforcement of the environmental commitments could have gone all the way to arbitration. Therefore, if the UK had been accused of failing to enforce the environmental non-regression clause – for instance, by the independent body failing to properly monitor air quality levels in the UK – then a dispute on this issue could have been brought to an arbitration panel (it is unclear, though, whether such a dispute could have resulted in a reference to the CJEU, given it may not have directly related to matters of EU law). This could be seen as a two-stage approach to enforcing the level playing field: first the responsibility was passed to the domestic authorities, but in the event of these authorities failing to enforce the agreement as required, there was an option for arbitration at the supranational level (DExEU 2018).

LABOUR AND SOCIAL STANDARDS

The enforcement arrangements for labour and social standards in the Irish Protocol broadly mirrored the approach taken to the environment. According to the protocol, the UK was expected to implement its own arrangements for enforcing the non-regression clause on labour and social standards. In particular, it referred to the UK maintaining "an effective system of labour inspections" to uphold protections, as well as administrative and judicial proceedings, effective remedies, and sanctions. The provisions for enforcement were, however, slightly weaker than the corresponding text in the environmental section of the level playing field: for instance, there was no requirement for an 'independent body' to enforce the labour and social commitments (DExEU 2018). The EU negotiating directives suggest a similar approach will be taken by the EU in the new negotiations (Council 2020).

For dispute resolution, in the Irish Protocol the arrangements for labour standards were identical to those for environmental protections. That is, disputes relating directly to the labour and social commitments could only be resolved by consultations in the Joint Committee. But for disputes relating to the enforcement of these commitments – for instance, where the EU raised a complaint on the reliability or effectiveness of the UK's labour inspections – it would have been possible to have arbitration by an independent panel (DExEU 2018). It is likely that the EU will propose the same approach for the functioning of the labour and social provisions in the future economic relationship.

TAXATION

In the original Irish Protocol, there was little detail on how the provisions on taxation within the level playing field would be enforced. Instead, the process of implementation was left to be decided at a later date by the Joint Committee. With respect to dispute resolution, the commitments on good governance and curbing harmful tax measures were exempted from arbitration. However, the commitments on specific areas of EU law were not exempted. This meant that disputes on the UK's implementation of EU directives on anti-tax avoidance and other relevant areas could have been brought to an arbitration panel. Moreover, given they related to specific areas of EU law, it would have been possible for disputes in this area to involve a ruling from the CJEU (DExEU 2018). While there is little detail on the governance arrangements for taxation in the EU negotiating directives, the EU is likely to take a similar approach to dispute resolution in the new negotiations (Council 2020).

The EU's stance in the negotiations over the governance of the level playing field is therefore likely to involve a complex mix of mechanisms, varying in robustness depending on the nature of the different commitments across each of the policy areas. (See table 3.2 for a summary.)

TABLE 3.2: ENFORCEMENT AND DISPUTE RESOLUTION FOR THE LEVEL PLAYING FIELD IN THE ORIGINAL IRISH PROTOCOL

Level playing field	Enforcement (for UK)	Dispute resolution
Competition and state aid	Domestic authorities, including independent body (with European Commission oversight for state aid)	Consultations in Joint Committee For state aid, arbitration possible; for competition policy, arbitration possible with respect to disputes about enforcement
Environment and climate change	Domestic authorities, including independent body	Consultations in Joint Committee Arbitration possible with respect to disputes about enforcement
Labour and social standards	Domestic authorities, including system of labour inspection	Consultations in Joint Committee Arbitration possible with respect to disputes about enforcement
Taxation	Unclear – presumably domestic authorities	Consultations in Joint Committee Arbitration possible with respect to disputes about alignment with EU directives

Source: Author's analysis

The UK, for its part, will be sceptical of any attempt by the EU to seek supranational oversight on level playing field issues. In his ministerial statement on the UK's approach to the negotiations with the EU, prime minister Johnson said that arrangements on governance and dispute settlement should be "appropriate to a relationship of sovereign equals" (Johnson 2020).

In this light, the UK's opening negotiating document includes minimal governance arrangements on level playing field issues. There is little mention of enforcing joint commitments, beyond a reference to enforcement procedures for competition law. Moreover, the UK's negotiating document proposes that the level playing field should largely be excluded from the agreement's standard dispute resolution mechanism (Prime Minister's Office 2020). This, the UK argues, reflects the precedent of other EU free trade agreements. For instance, in CETA the provisions on consultations on subsidies and the non-regression clauses on labour and the environment are exempt from standard dispute resolution. Disputes relating to the non-regression clauses are instead subject to consultations, followed up if necessary by a recommendation from a 'panel of experts'. There are no sanctions for not following the recommendations of the panel (EC 2014). The UK is likely to argue for the same approach in the case of the UK-EU future partnership.

The UK is also resisting any involvement of the CJEU, however indirect, in dispute resolution, given ending the jurisdiction of the CJEU is a core objective of the government's approach to Brexit (Prime Minister's Office 2020). But the EU is unlikely to move on the role of the CJEU – given that it is a legal requirement for the CJEU to be the sole arbiter of EU law. Were the UK and the EU to negotiate an agreement that excluded the CJEU from ruling on matters of EU law, this agreement would itself be at risk of being struck down by the CJEU as a violation of the EU treaties.

The negotiations on the governance of the level playing field are therefore likely to follow a similar pattern to the negotiations on the substantive provisions themselves. The environmental and labour commitments are likely to be easier to negotiate, due to the EU's emphasis on domestic enforcement and its more flexible approach to dispute settlement. But the competition and state aid commitments are likely to be much more challenging, given the EU wants strict oversight over the CMA and given the possible role of the CJEU in settling disputes.

4. HOW CAN THE LEVEL PLAYING FIELD BE MADE TO WORK EFFECTIVELY?

Irrespective of how a compromise is found between the UK and the EU, it is essential that any commitments to a level playing field can be easily understood and are interpreted consistently by both sides. Without well-defined commitments, there is a significant risk of legal uncertainty and confusion. This section identifies the key priorities for the negotiators to consider in order to ensure that the level playing field commitments are accessible, effective and enforceable.

Drawing on what is already known about the level playing field from the UK and EU positions and the text of the original Irish Protocol, there are three areas that are worth particular scrutiny in the current negotiations.

First, it is important that **any level playing field commitments are precise about their scope.** In the original Irish Protocol, some level playing field commitments – eg on state aid – referred to specific EU laws and treaty provisions – and some commitments – eg on the environment – referred to specific areas of the EU acquis. However, other commitments were less precise.

For instance, the non-regression clause on labour and social standards referred to "fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring" (DExEU 2018). Unlike the non-regression clause on environmental standards, this did not cover a clearly defined area of EU law. The non-regression clause could have listed areas more precisely – covering, for example, areas such as equal treatment in the workplace, reconciling family and professional life, awareness of conditions of employment, equal treatment regardless of type of contract, limitation of working time, protection in the event of termination of employment, protection of young people at work, and equal treatment in social security and social integration (see EC 2016b). To ensure the level playing field works effectively and is interpreted consistently, it is therefore important for there to be closer scrutiny of the precise scope of the commitments on the level playing field in this stage of the negotiations.

Second, it is important that **there is a clear and effective process for governing the level playing field commitments.** As explained in the previous section, the approach to governing the level playing field in the former Irish Protocol involved a complex medley of processes.

In particular, the method for dispute resolution for the environment, labour and competition provisions was far from straightforward. It involved prioritising domestic enforcement of the level playing field commitments, while allowing for arbitration relating to disputes on the enforcement – but not the substance – of such commitments. There is a risk that this approach could create significant legal uncertainty.

For instance, suppose the UK and the EU agreed this model of governance and the EU subsequently raised a dispute with the Joint Committee in response to the UK parliament legislating to disapply parts of the Working Time Directive.

Responding to the EU's complaint, the UK could claim that this amendment did not in fact lower the UK's level of labour protections because overall standards remained high. After consultations in the Joint Committee, the EU might argue that the dispute should be referred to an arbitration panel, on the basis that the UK was failing to enforce the non-regression clause on labour and social standards. But the UK could argue that this dispute did not relate to the enforcement of the non-regression clause, because the UK's approach to enforcement – its labour inspection bodies, its judicial procedures, and so on – was not in question; rather the EU was disputing the UK's interpretation of non-regression. Therefore, the UK could argue, the EU's dispute centred on the substance of the non-regression clause, not its enforcement, and so could not be brought to arbitration. In such an instance, it is not entirely clear how such a dispute would be resolved.

It is therefore of great significance that any agreement on enforcing the level playing field is clear from the outset and that the process for dispute resolution is understood and interpreted consistently by both sides.

Third, it is important for **there to be a role for civil society in the operation of the level playing field commitments.** Typically in trade and sustainability chapters in free trade agreements, there are provisions for setting up domestic advisory groups (DAGs). These are civil society forums made up of worker and business representatives and other relevant stakeholders on labour, environment and sustainability issues. DAGs are set up to help advise and submit opinions and recommendations on the functioning of the trade and sustainability chapters, including non-regression clauses on labour and environmental standards.

However, the approach taken in the original Irish Protocol largely omitted civil society from the monitoring or enforcing of the level playing field. There was a brief reference to social dialogue in the section on labour and social standards, but there was no requirement for the UK and the EU to set up DAGs to advise on the level playing field. If a similar approach is taken in the new negotiations on the economic relationship, this could make it harder for civil society to hold the UK and the EU to account for upholding the level playing field commitments. This could in turn undermine the effectiveness of the level playing field.

The EU negotiating directives suggest that this omission may be rectified in the new discussions, given there is a reference to providing for "civil society participation and dialogue" (Council 2020). But it is unclear to what extent civil society involvement will be included in the governance of the level playing field; there is a risk that civil society engagement will be simply tokenistic rather than substantive and that there will be limited routes to hold the UK and EU to account for their commitments. To ensure the agreement works effectively, it is therefore important for the negotiations to ensure a robust and sustained role for civil society to monitor the relevant level playing field commitments.

A final issue relates to access to justice for individuals who wish to raise concerns about the operation of the level playing field. As explained above, the expected approach to dispute resolution in the negotiations will be state-to-state – that is, it will be for the UK and the EU to raise complaints about the future agreement on behalf of their citizens, rather than individuals directly. Nevertheless, to support the smooth functioning of the level playing field and to make it more accessible to the public, it would be useful for the UK-EU agreement to be explicit about how individual citizens can raise complaints where they believe level playing field commitments are not being effectively enforced at the domestic level. For instance, the domestic advisory groups could be tasked with setting up a process to receive complaints from individuals who allege they have lost out due to either party's failure to enforce the level playing field. Where appropriate, these complaints could then be passed on to the UK-EU Joint Committee and potentially form the basis of a formal dispute.

CONCLUSION

This briefing has summarised the current state of play on the level playing field and the UK and the EU's opening positions as the negotiations on the future economic partnership begin. It is likely that the level playing field will be a point of significant tension in the coming months as the negotiations develop. The EU's expectations for the level playing field – including requirements for the UK to continue to follow EU law on state aid and competition policy, to not reduce current levels of environmental and labour protections, and to agree to a dispute resolution mechanism that in some cases could lead to a ruling from the CJEU – appear to be in conflict with the UK's own objectives to make its laws independently of EU institutions.

However, it is quite possible that – in some areas at least – a compromise can be found. There is some scope, for instance, for a compromise on labour and environmental protections, where the EU is not looking for the UK to continue to align with EU law and where the EU's approach to enforcement and dispute resolution appears relatively flexible. Indeed, perhaps the obvious landing zone here is the original non-regression clause agreed by the UK and the EU in the first iteration of the Irish Protocol in 2018.

For civil society, the key challenge for these negotiations will be to ensure that the search for compromise does not result in level playing field commitments that are too vague, convoluted or ineffective. It is particularly important that careful attention is paid to the precise scope of any level playing field commitments, the approach to enforcement and dispute resolution, and the role for civil society organisations. If these areas are compromised, there is a risk that the level playing commitments give rise to legal uncertainty and confusion. For the level playing field arrangements to be sustainable, it is therefore essential that any commitments made are clear, accessible, and interpreted and applied consistently by both the UK and the EU.

REFERENCES

Conservative Party (2019) 'Take back control and back Britain', news story. https://vote.conservatives.com/news/take-back-control-and-back-britain

Council of the European Union [Council] (2020) 'Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland', press release. https://www.consilium.europa.eu/en/press/press-releases/2020/02/25/eu-uk-relations-council-gives-go-ahead-for-talks-to-start-and-adopts-negotiating-directives/

Department for Exiting the EU [DExEU] (2018) *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018*. https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration

Department for Exiting the EU [DExEU] (2019) *Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom*. https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration

European Commission [EC] (2014) 'Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union'. http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

European Commission [EC] (2016a) 'The Anti-Tax Avoidance Directive'. https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package/anti-tax-avoidance-directive_en

European Commission [EC] (2016b) 'The EU social acquis', Commission Staff Working Document. https://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=10102&year=2016&number=50&version=ALL&language=en

European Commission [EC] (2017) 'Slide presented by Michel Barnier, European Commission Chief Negotiator, to the Heads of State and Government at the European Council (Article 50) on 15 December 2017'. https://ec.europa.eu/commission/publications/slide-presented-michel-barnier-european-commission-chief-negotiator-heads-state-and-government-european-council-article-50-15-december-2017_en

European Commission [EC] (2018) 'Internal EU27 preparatory discussions on the framework for the future relationship: "Level Playing Field"'. https://ec.europa.eu/commission/publications/slides-level-playing-field_en

House of Lords (2017) 'Brexit: agriculture', European Union Committee, 20th Report of Session 2016-17. https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/169/16902.htm

Johnson B (2020) 'UK / EU relations: written statement', House of Commons. https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-02-03/HCWS86/

Lowe S (2020) 'Flexibility does not come for free', blog post, Centre for European Reform. https://www.cer.eu/insights/flexibility-does-not-come-free

Lydgate E (2018) 'Environmental non-regression in the Withdrawal Agreement: forcing the EU's hand on the Level Playing Field', UK Trade Policy Observatory. https://blogs.sussex.ac.uk/uktpo/2018/11/21/environmental-non-regression-in-the-withdrawal-agreement-forcing-the-eus-hand-on-the-level-playing-field/

Morris M (2018) *Leaving the EU, not the European model? New findings on public attitudes to Brexit (part one)*, IPPR. https://www.ippr.org/publications/leaving-the-eu-not-the-european-model

Morris M and Emden J (2018) *Brexit and the UK's environmental ambitions*, IPPR. http://www.ippr.org/research/publications/brexit-environmental-ambitions

Morris M (2019a) *No-deal Brexit: The implications for labour and social rights*, IPPR. http://www.ippr.org/research/publications/no-deal-brexit-implications-for-labour-and-social-rights

Morris M (2019b) 'Labour and social standards' in *Ensuring a level playing field post-Brexit*, European Policy Centre. https://www.epc.eu/en/publications/Ensuring-a-post-Brexit-level-playing-field~26c1e0

Office of the United States Trade Representative [USTR] (2019) 'United States-United Kingdom negotiations: summary of specific negotiating objectives'. https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf

Peretz G (2018) 'State aid and the Withdrawal Agreement: key points', Monckton Chambers Brexit Blog. https://www.monckton.com/state-aid-and-the-withdrawal-agreement-key-points/

Prime Minister's Office (2020) *The Future Relationship with the EU: The UK's Approach to Negotiations*. https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu

Verouden V and Colomo P I (2018) 'State aid control' in *Ensuring a level playing field post-Brexit*, European Policy Centre. https://www.epc.eu/en/publications/Ensuring-a-post-Brexit-level-playing-field~26c1e0

Institute for Public Policy Research

GET IN TOUCH

For more information about the Institute for Public Policy Research, please go to www.ippr.org

You can also call us on +44 (0)20 7470 6100, e-mail info@ippr.org or tweet us @ippr

Institute for Public Policy Research
Registered Charity no. 800065 (England & Wales), SC046557 (Scotland), Company no, 2292601 (England & Wales)

The progressive policy think tank