

WHAT DOES THE UK-EU DEAL MEAN FOR WORKERS' RIGHTS?

Marley Morris

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ABOUT THE AUTHORS

Marley Morris is associate director for migration, trade, and communities at IPPR.

ABOUT THIS PAPER

This paper fulfils IPPR's educational objective by publishing research to inform the public and civil society on the labour rights provisions in the UK-EU Trade and Cooperation Agreement.

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SUMMARY

The UK-EU trade agreement places constraints on how much the UK can diverge from the EU on the issue of workers' rights. As part of the Trade and Cooperation Agreement (TCA) signed at the end of 2020, the UK and the EU have committed to upholding a 'level playing field' to prevent either side from gaining an unfair competitive advantage over the other. The level playing field includes specific provisions on labour and social standards.

There are three main provisions on labour and social standards in the UK-EU deal.

- 1. There is a non-regression clause which commits the UK and the EU to not reducing their labour and social protections, in a way which affects trade or investment, below the levels they had at the end of the transition period (ie 31 December 2020).** The areas covered by the non-regression clause include fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights, and restructuring of undertakings. Crucially, the non-regression clause only applies where a reduction in protections affects trade or investment between the UK and the EU.
- 2. There are commitments to multilateral standards, including International Labour Organisation (ILO) standards.** These include specific commitments to the four fundamental ILO principles and rights at work, relating to (a) freedom of association and the right to collective bargaining (b) forced labour (c) child labour, and (d) discrimination with regard to employment and occupation. There are also provisions committing both sides to implementing ILO conventions that have been ratified and provisions of the European Social Charter which have been accepted.
- 3. There is a rebalancing clause, which enables either side to take 'rebalancing measures' (eg imposing trade barriers) in the event of significant divergences in the area of labour and social protection.** The divergences must have a material impact on trade or investment between the UK and the EU and the measures can only be applied for the duration and extent necessary to address the situation. This clause addresses the circumstance where one side has made advances in labour protections but its counterpart has failed to keep pace, resulting in a significant gap in standards which generates an unfair competitive advantage.

Where the UK and the EU disagree over the labour provisions, there is a formal process for resolving disputes – with the possibility in some cases for either side to apply retaliatory measures. At first, the two sides should attempt to resolve the issue through consultations. If this is unsuccessful, they can convene an independent 'panel of experts' to investigate and produce a report. In the case of the non-regression clause, there is scope for one side to seek remedies – in the form of temporary compensation or the suspension of treaty obligations – when the other side does not take action to conform with the report of the panel of experts. The rebalancing clause has a separate procedure for resolving disputes, in order to allow for the rapid use of rebalancing measures in the event of significant divergences.

The government has recently announced that it is planning to review all retained EU law, which unions have warned could threaten EU-derived labour protections. While the government has maintained that it wants to uphold high standards for workers' rights, there has been mixed messaging about plans for future regulatory reform. Reports in 2021 suggested that it was considering introducing a package of deregulatory measures on labour standards, but a post-Brexit review of employment law associated with these plans has since been axed. There are also concerns that the UK is falling behind EU developments to improve workers' rights – for instance, the recent proposed European Commission directive on improving conditions in platform work.

Were the UK to diverge from EU labour and social standards in future, it could face action from the EU under the terms of the Trade and Cooperation Agreement. According to this briefing's assessment, the EU would be particularly likely to successfully take action if the UK diverged in a way which:

- reduced labour protections
- disregarded fundamental ILO rights and principles
- occurred at a sufficiently large scale
- directly affected a tradeable sector such as manufacturing
- and/or could be shown to substantially lower labour costs.

This suggests that the UK would be at particular risk of facing EU action if, for instance, it was to embark on a clear and permanent act of deregulation which targeted EU-derived legislation such as the working time directive, and if the act of deregulation gave a tradeable sector a competitive advantage through substantially reduced labour costs.

Civil society organisations can play an important role in upholding the level playing field and the provisions on workers' rights in the Trade and Cooperation Agreement. While trade unions and NGOs cannot directly raise a complaint under the terms of the agreement, they can play an indirect role through domestic advisory groups and informal channels. In particular, they can play a role in upholding the level playing field by monitoring the extent to which the UK and the EU maintain their commitments to protect workers' rights and by providing evidence of any potential breaches or divergences in standards.

1.

INTRODUCTION

It has been just over a year since the UK and the EU signed the Trade and Cooperation Agreement (TCA), the deal providing the basis for their post-Brexit relationship. One of the most important and contested parts of the agreement was the so-called ‘level playing field’ – the arrangements for preventing either side from gaining an unfair competitive advantage over the other. This applied to a number of areas of regulation, including state subsidies, competition, taxation, environment and climate policy, and – most importantly for this briefing – labour and social standards.

The level playing field proved to be particularly controversial in the negotiations, because the UK was intent on maximising its flexibility to diverge from EU legislation, including in the area of labour protections. Eventually a deal was found, whereby the UK and the EU agreed certain provisions on labour and social standards while acknowledging their right to develop their own rules.

Yet since the deal was agreed at the end of 2020, there has been mixed messaging about the government’s future plans. Early in 2021, there were reports that the Department for Business, Energy and Industrial Strategy (BEIS) was planning to implement a package of measures to deregulate the labour market, including weakening a series of key protections from the working time directive (Foster et al 2021). Business secretary Kwasi Kwarteng then quashed these rumours by signalling that he had cancelled a review into EU employment law and that the department was “not interested in watering down workers’ rights” (Mohamed 2021).

Shortly after, the prime minister convened three Conservative MPs to form a ‘Taskforce on Innovation, Growth and Regulatory Reform’, exploring how the UK could use its post-Brexit powers to spur business activity and remove administrative burdens. The taskforce reported to the government in May 2021 and made a series of recommendations for adapting UK regulations, outlining a post-Brexit framework for “proportionate, agile, and less bureaucratic regulation” (TIGRR 2021). The report advocated for returning to the ‘one-in, two-out’ rule – the idea that for every new regulation introduced with a cost to business, the government should scrap other regulations which are at least as twice as costly – and proposed a new ‘proportionality principle’ to encourage a risk-based and outcome-focused approach to regulation. It was followed by a public consultation into reforming the government’s framework for better regulation. However, beyond a few broad references to protecting workers’ rights, there was little indication in the taskforce’s report of the future regulatory agenda on labour standards (ibid).

Most recently, the government has set out plans to reform ‘retained EU law’. This refers to everything which has been either transposed or preserved in UK law through the 2018 EU Withdrawal Act, including direct EU legislation, EU-derived domestic legislation, and other relevant EU rights and obligations. In September 2020, the then Cabinet Office minister Lord Frost explained that he wanted to both reconsider the ‘special status’ of retained EU law and to conduct a comprehensive review of its content (Cabinet Office and Frost 2021).

Again, however, it is not clear what this means for the future of retained EU law relating to labour standards and how this might interact with the level playing field provisions agreed within the TCA.

Alongside these developments in government, civil society organisations have warned about the risks of the UK diverging from the EU's economic and social model. Trade unions in particular have expressed concern that the UK could 'fall behind' the EU on labour standards and that the newly announced reviews of retained EU law pose a risk to current protections (BBC 2021; Strauss 2021).

This short briefing sets out the implications of the level playing field provisions in the TCA for any future UK reforms relating to workers' rights. We first explain how the level playing field for labour and social standards works and the mechanisms for enforcing the provisions and resolving disputes. We then explore where the government may seek to diverge from EU labour standards in light of Brexit and how this may lead to a response from the EU under the terms of the TCA. The briefing aims to provide an insight into how the level playing field might work in practice and to what extent it upholds labour and social protections for workers in the UK.

2.

THE 'LEVEL PLAYING FIELD' IN THE TCA

As part of the 'level playing field' in the TCA, the UK and the EU jointly negotiated a number of provisions on labour and social protections. There are three main provisions: a non-regression clause aimed at maintaining existing protections, a set of commitments to multilateral standards, and a rebalancing clause in the event of significant divergences in standards over time.

NON-REGRESSION CLAUSE

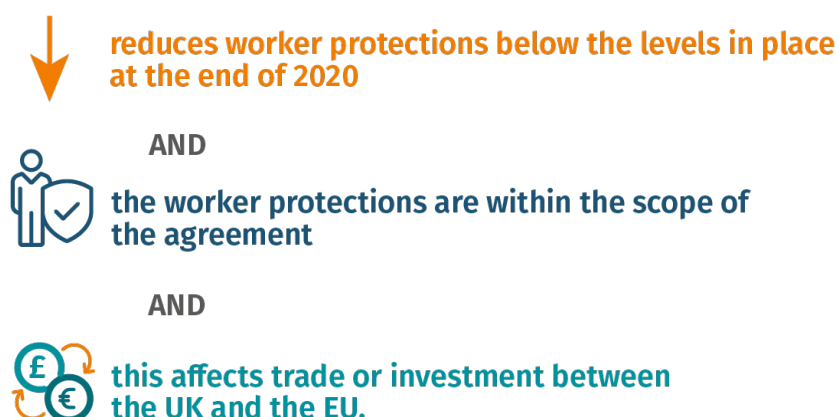
The non-regression clause commits both the UK and the EU to not weakening or reducing their levels of labour and social protections, in a way which affects trade or investment, below the levels they each had at the end of the transition period (ie 31 December 2020) (TCA Art 387(2)). In contrast to non-regression clauses in other agreement, one single instance of a weakening or reduction is in principle sufficient for the clause to be breached (Ortino 2022).

Figure 2.1: Summary of the non-regression clause

How does the non-regression clause work?

The UK and the EU have committed to a non-regression clause to maintain current worker protections.

There will be a breach of the clause if either side:



Source: IPPR analysis of TCA

There are two main caveats to the non-regression commitment. First, the TCA defines ‘labour and social levels of protection’ as the level of protection provided overall by laws and standards in the following policy areas: ‘fundamental rights at work’, ‘occupational health and safety standards’, ‘fair working conditions and employment standards’, ‘information and consultation rights at the company level’, and ‘restructuring of undertakings’ (TCA Art 386(1)).

While these are not clearly defined in the text, a study by Ewing (2021) suggests that ‘fundamental rights at work’ refers to the rights within the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work, which include: freedom of association and the right to collective bargaining (such as the right to form and join trade unions); the elimination of forced labour; the abolition of child labour; and the prohibition of discrimination relating to employment and occupation.

The other four areas appear to relate to aspects of EU labour law: ‘occupational health and safety standards’ is likely to cover EU health and safety directives, including the framework directive on safety and health at Work; ‘fair working conditions and employment standards’ is likely to cover the working time directive and protections for part-time, fixed-term, and temporary agency workers; ‘information and consultation rights at the company level’ is likely to cover the information and consultation directive, as well as the information and consultation requirements in the collective redundancies directive; and ‘restructuring of undertakings’ is likely to cover the transfer of undertakings directive, which safeguards employee rights when their organisation is transferred to a new owner (based on Ewing 2021 and Ortino 2022). See figure 2.2 for a summary of what is covered in the scope of the non-regression clause.

Figure 2.2: The material scope of the non-regression clause

What is the scope of the non-regression clause?

The scope of the non-regression clause is limited to protections provided by domestic law and standards in the following areas:

-  **fundamental rights at work (eg the right to form and join trade unions)**
-  **occupational health and safety standards (eg the duty for employers to ensure the health and safety of their workers)**
-  **fair working conditions and employment standards (eg protections for temporary agency workers)**
-  **information and consultation rights at company level (eg the requirement for employers to consult on collective redundancies)**
-  **restructuring of undertakings (eg protections for employees when moving to a different employer due to a merger or legal transfer)**

Source: IPPR analysis of TCA

The second main caveat to the non-regression commitment is that a weakening or reduction in the level of protection is only considered a breach if it affects trade or investment between the UK and the EU (TCA Art 387(2)). This is an important limitation which we will turn to separately towards the end of this chapter.

According to the TCA, the non-regression clause should at first be enforced by each side through measures such as labour inspections, administrative and judicial proceedings, as well as remedies and sanctions (TCA Art 388). The initial emphasis is therefore on domestic enforcement.

However, where there are disagreements over the non-regression clause, the TCA sets out bilateral processes for resolving them. At first, the UK and the EU are expected to engage in dialogue and consultations to resolve the dispute (TCA Art 389(1)).

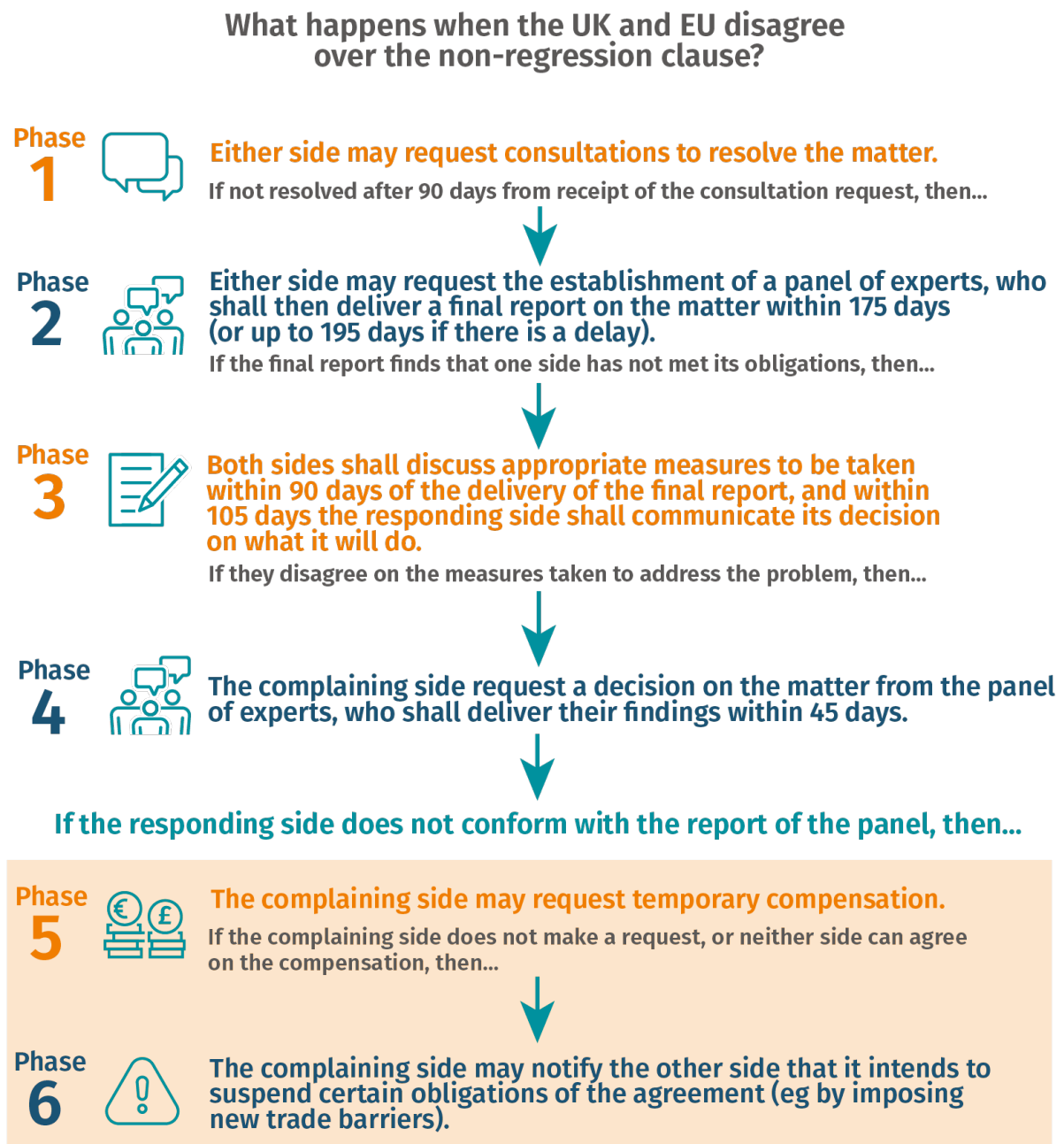
If initial talks are unsuccessful, then either side has recourse to the formal dispute resolution process. This is distinct from the main dispute resolution process in the TCA, though there are clear parallels. The first stage involves one party (either the UK or the EU) making a written request for consultations, followed by both parties engaging in consultations with the intention of reaching a 'mutually satisfactory resolution' of the matter at hand (TCA Art 408(1-2)). As part of the consultations, the UK and the EU can seek expert advice, including advice from their respective domestic advisory groups (DAGs) (TCA Art 408(4)). These are advisory bodies made up of civil society representatives – including trade unions, employer bodies and NGOs – which are established by each side to discuss the implementation of different aspects of the agreement (TCA Art 13).

If consultations are not sufficient, then after 90 days from the receipt of the initial request either party may ask for a 'panel of experts' to be convened (TCA Art 409(1)). The panel would be made up of three people selected from a list of at least 15 independent experts pre-agreed by the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development (the joint UK-EU committee tasked with overseeing the level playing field) (TCA Art 409(2-3)). Within 175 days of its inception (and no later than 195 days if there is a delay), the panel is required to deliver a non-binding final report setting out its conclusions (TCA Art 409(13)).

In the event that the final report of the panel of experts concludes that either party has not 'conformed with its obligations' – ie has breached the non-regression clause – then the parties are expected to discuss 'appropriate measures' within 90 days of the report being delivered (TCA Art 409(16)). Within 105 days of the report being delivered, the responding party must inform its DAGs and the complaining party of any measures it will take in response (TCA Art 409(16)). The follow-up should be monitored by the Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development, with the support of the DAGs (TCA Art 409(17)).

Following the delivery of the report from the panel of experts, there may be a disagreement between the parties over the 'appropriate measures' taken to address the issue. Where a measure is disputed, the complaining party can make a written request to the panel of experts for them to investigate and decide on the matter at hand. The panel then has 45 days to submit its findings (TCA Art 409(18)).

Figure 2.3: Summary of the dispute resolution process for the non-regression clause



Source: IPPR and Federico Ortino’s analysis of TCA

Moreover, where a party does not take action to conform with the report from the panel of experts, there is scope for the complaining party to retaliate. This can be in the form of requesting temporary compensation or suspending its obligations under certain parts of the agreement – for instance, by imposing tariffs on trade in goods (TCA Art 410 and Art 749). Where a party seeks to suspend treaty obligations, it must notify its counterpart; the other party then has an opportunity to challenge these retaliatory measures if it considers them excessive, in which case there is a further referral back to the panel of experts for a final decision (TCA Art 749(11)). This procedure ensures that meaningful remedies can be

sought where there is a breach of the non-regression clause, including in the form of a financial settlement or the imposition of trade barriers.

A simplified summary of the dispute resolution process can be found in figure 2.3.

COMMITMENTS TO MULTILATERAL STANDARDS

Alongside the non-regression clause for labour and social protections, the TCA also contains a number of provisions committing the UK and the EU to multilateral labour standards and agreements. In particular, there is a commitment to respecting, promoting and implementing the four fundamental principles and rights at work noted above, which relate to: (a) freedom of association and collective bargaining (b) eliminating forced labour (c) abolishing child labour, and (d) eliminating discrimination with regard to employment and occupation (TCA Art 399(2)).

The text also includes a commitment for each party to implement ILO conventions which have been ratified and provisions of the European Social Charter which have been accepted (TCA Art 399(5)). Finally, there is a commitment to promote the ILO Decent Work Agenda, including on decent working conditions (such as wages, working hours, and maternity leave), occupational health and safety, and non-discrimination (TCA Art 399(6)).

The process for resolving disputes over the provisions on multilateral labour standards and agreements is the same as that for the non-regression clause (TCA Art 407). Disagreements are meant to be resolved first through consultations; then, if this fails, through convening a panel of experts to report on the matter. However, unlike with the non-regression clause, there is no recourse to remedies – including temporary compensation or trade restrictions – if one party does not act in accordance with the panel of experts' report.

In principle, these provisions commit the UK and the EU to a wide range of substantive labour protections (Ewing 2021). Moreover, unlike the non-regression clause, there is no explicit requirement for a breach to be linked to impacts on trade or investment. Yet given evidence that the UK and EU member states are already in breach of ratified ILO conventions (ibid) – and in light of the limited remedies available in the event of a dispute – in practice these provisions may be hard to fully enforce. This will be discussed in further depth in the following chapter.

REBALANCING CLAUSE

Alongside the above provisions, the UK and the EU also agreed a unique and innovative addition to the level playing field: a rebalancing clause.

The idea behind this clause is that, even if the UK and the EU maintain their current levels of protections, there may be divergence over time which creates an unfair competitive advantage for one side over the other. For instance, the UK may maintain its current labour standards but not keep pace with EU developments, leading to a gap in the level of protection over time.

In order to address this risk, the TCA states that either party may take 'appropriate rebalancing measures' in the event of significant divergences in the areas of labour and

social protection, environment and climate protection, or state subsidy control, where these divergences in turn have a material impact on trade or investment between the UK and the EU. The rebalancing measures can only be applied for the duration and extent necessary to address the situation. The party must also take their decision to apply rebalancing measures on the basis of ‘reliable evidence’, rather than simply ‘conjecture or remote possibility’ (TCA Art 411(2)).

Figure 2.4: Summary of the rebalancing clause

How does the rebalancing clause work?

The UK and the EU have committed to a rebalancing clause to allow either side to respond if there are significant divergences in standards over time.

In the case of workers’ rights, rebalancing measures can be taken if:



Source: IPPR analysis of TCA

The TCA sets out a complex multi-stage process for invoking rebalancing measures. First, the party intending to take rebalancing measures is expected to notify its counterpart of its intentions and enter into consultations for up to 14 days. If this does not lead to a resolution, then the party may introduce rebalancing measures from five days after the end of the consultations.

However, the other party can choose to challenge the rebalancing measures within this five-day period by requesting the creation of an arbitration tribunal to determine whether the measures are justified under the TCA. In this case, any rebalancing measures would be delayed. The arbitration tribunal would have 30 days to deliver a final ruling. If it were to find in favour of the concerned party (ie the party intent on taking rebalancing measures), then the rebalancing measures may be enacted. If it were to find against, then the concerned party would be expected to notify its counterpart of the measures it will take to comply with the ruling. If no final ruling is delivered within 30 days, the concerned party can enact rebalancing measures before the ruling of the arbitration panel (provided this is

at least three days after the expiry of the 30-day period). Moreover, the other party is also permitted to take corresponding ‘countermeasures’ until a final ruling is delivered (TCA Art 411(3)).¹

This complex process allows for the EU (or the UK) to take quick action to impose trade barriers on the UK (or vice versa) where it judges that significant divergences in standards leave it at a competitive disadvantage. At the same time, there is scope for the UK (or EU) to retaliate. The rebalancing clause therefore operates in a notably different way to standard dispute resolution procedures – apparently prioritising the ability of each party to take swift retaliatory measures over waiting for independent arbitration.

THE TRADE/INVESTMENT LINK

As discussed above, both the non-regression and rebalancing clause include a requirement for there to be an impact on trade or investment. This means that in order to invoke the non-regression clause the EU would need to demonstrate that a reduction in the level of protection had an effect on trade or investment between the UK and the EU. In order to invoke the rebalancing clause, the EU would need to go further and demonstrate a ‘material impact’ on trade or investment resulting from significant divergences in standards.

But what might a trade or investment link look like in practice? While there is no clear answer, two recent panel reports shed some legal light on the matter.

First, one of the key reference points for understanding the phrase ‘in a manner affecting trade or investment’ comes from the 2017 panel report on the US-Guatemala dispute over labour rights. In this dispute, the US accused Guatemala of failing to uphold its labour commitments under the Dominican Republic – Central America Free Trade Agreement (CAFTA-DR). Within the labour chapter in CAFTA-DR, the text states that “A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”. The US alleged that Guatemala was not living up to this commitment, critiquing in particular its enforcement of “the right of association, the right to organize and bargain collectively, and acceptable conditions of work”. Following consultations, a formal arbitration panel was convened (Arbitral panel report 2017).

The arbitration panel assessed in particular how to interpret the phrase ‘in a manner affecting trade between the Parties’, which is a similar formulation to the phrasing in the UK-EU TCA. It concluded that in the context of CAFTA-DR the phrase meant that one or more employers engaged in trade between the countries in the agreement had been conferred a competitive advantage (Arbitral panel report 2017 para 190). In order to demonstrate this, the panel argued that the following factors would need to be considered (Arbitral panel report 2017 para 193-6).

¹ If the party which is notified of the rebalancing measures does not pursue this ‘fast-track’ arbitration process, it can also initiate arbitration proceedings through the standard dispute resolution process in the TCA (TCA Art 411(3)(h)).

(a) Are the employers in question exporting to the other countries in the agreement, or are they competing with importers from the other countries in the agreement?

(b) Does the failure to enforce labour laws have any impact on the employers, and what is this impact (in particular, are there cost savings)?

(c) Are the impacts sufficient to confer a competitive advantage (in particular, are they not “too brief, too localized, or too small”)?

Based on this panel’s interpretation, there is a relatively high bar for demonstrating a link to trade or investment in similar labour clauses. If the same approach is applied to the non-regression clause in the TCA, then in order to show a breach one would need to demonstrate that a reduction in labour protections had conferred a competitive advantage on one or more UK employers engaged in trade with the EU (or vice versa). This would involve investigating whether the lowering of labour protections in the UK had affected businesses in direct competition with businesses in the EU and that the effects were sufficient to give them a competitive advantage – typically by finding evidence of substantially reduced labour costs.

However, a more recent report from a panel of experts on a dispute between the EU and South Korea points to an alternative approach to interpreting the trade/investment link in labour clauses. This panel report addressed a dispute over an article on multilateral labour standards in the EU-South Korea Free Trade Agreement (FTA). This article included a commitment to respect, promote and realise the four ILO fundamental principles and rights at work and to make ‘continued and sustained efforts’ to ratify the fundamental ILO conventions (similar to the TCA provisions discussed above). The EU alleged that South Korea had failed to uphold these commitments. For its part, South Korea argued that this matter was out of scope of the agreement because the trade and sustainability chapter is limited to only ‘trade-related aspects of labour and environmental issues’ (Report of the panel of experts 2021 para 56).

In its assessment, the panel of experts rejected South Korea’s argument that the provisions in question should be interpreted as only applying to trade-related matters. The panel noted that the scope of the trade and sustainability chapter is limited to trade-related matters ‘except as otherwise provided’ – ie there can be exceptions. It then argued that the ILO provisions in the agreement were universal in nature and so to limit their scope to only trade-related matters would be inappropriate (Report of panel of experts 2021 para 68). Moreover, the panel also noted separately that, because the EU and South Korea had highlighted in the FTA that fundamental labour rights were integral to their ambitions for trade and sustainability, “national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA” (Report of panel of experts 2021 para 95).

While the EU-South Korea panel does not directly contradict the CAFTA-DR panel decision – because they are interpreting different provisions in different agreements – there appears to be a tension between the approaches of the two panels (see LeClercq 2021). In the case of the CAFTA-DR dispute, the panel’s interpretation focused in particular on the objective of promoting conditions of fair competition, as specified at the start of the trade

agreement. On the other hand, the EU-South Korea panel placed greater emphasis on the role of the trade agreement in promoting fundamental labour rights and principles (ibid).

How, then, should the labour non-regression and rebalancing clauses be interpreted? On the face of it, the most plausible interpretation is likely to be closer to that of the CAFTA-DR panel decision, because the wording of the non-regression clause is closer to that of the CAFTA-DR labour provision. Moreover, the rebalancing clause appears to have even tougher requirements for proving a link with trade or investment, given the specific references in the text to demonstrating 'material impacts' on the basis of 'reliable evidence'. This suggests that the bar for demonstrating a link with trade or investment is likely to be relatively high (particularly in the case of the rebalancing clause). But considering that there has been only limited legal exploration of these concepts until now, it is still hard to determine with any certainty how they may be interpreted by a panel of experts convened by the UK and the EU, were there to be a dispute over these labour provisions in future.

3.

THE ‘LEVEL PLAYING FIELD’ IN PRACTICE

In this chapter, we explore how the ‘level playing field’ with respect to labour and social standards might work in practice. While much here is still speculative, given it is unclear both how the UK plans to develop its labour policy in future and how the EU might respond, we draw on the available evidence to highlight some themes and possibilities. The chapter first outlines where the UK may diverge from EU labour and social standards and then considers the most likely circumstances where the level playing field may act as a constraint.

FUTURE DIVERGENCE IN LABOUR AND SOCIAL STANDARDS

Up until now, the UK has not set out plans for labour rights post-Brexit. In December 2019, the government included an employment bill in its Queen’s speech, which it said would “protect and enhance workers’ rights as the UK leaves the EU” (Prime Minister’s Office 2019). But the bill has been significantly delayed and was omitted from the subsequent Queen’s speech in 2021. (According to the government, the delays are due to the pandemic.) There is little mention of employment rights in the July 2021 report of the independent Taskforce on Innovation, Growth and Regulatory Reform, other than some brief references to protections for workers, and there is no indication of the government’s intentions on labour rights in its recent announcements on reviewing retained EU law.

This means that it is hard to know with any certainty the government’s direction of travel on labour and social protections. There are, however, earlier comments from senior members of the government which provide an indication of where there may be future divergences from EU law. Perhaps most prominently, the Prime Minister in 2014 critiqued EU employment legislation – including specifically the working time directive, the Collective Redundancies Directive, and legislation on atypical workers – as ‘back-breaking’ (Bennett 2014). Media reports have also suggested that elements from the working time directive – including the 48-hour week and rules on rest breaks and the calculation of holiday pay – were a target for deregulation by government before it axed its post-Brexit review into employment law (Foster et al 2021).

It is highly unlikely that the government will seek to completely repeal such legislation, given widespread public backing for key worker protections (Morris 2018). But it is possible that it could look to introduce targeted reforms, as well as derogations for particular sectors and businesses. For instance, the transport secretary Grant Shapps has recently introduced temporary measures for the road haulage sector, relaxing EU-derived rules on driving hours in response to driver shortages (DfT and DVSA 2021).

The government’s policy on introducing new freeports could also have implications for workers’ rights (Barnard 2021). In the March 2021 budget, the chancellor announced the establishment of eight new freeports in England, two of which are now in operation (Webb

and Jozepa 2021). There is no formal definition of freeports, but they are typically considered to be designated zones around ports which offer special tax and customs benefits for businesses, as well as other economic advantages (ibid). Internationally, freeports have been associated with labour rights abuses, included restrictions in trade union access, and in rare cases freeports have been used to introduce derogations from employment regulations (Crawford 2021). While the government has not yet proposed to weaken labour protections as part of its policy on freeports, this possibility was an area of concern for the European Commission during the Brexit negotiations (EC 2018).

Even if the UK chooses to maintain its current level of labour protections, there is a risk of divergence as a result of not keeping pace with EU developments. In particular, the EU has recently introduced new legislation to strengthen workers' rights, including the Transparent and Predictable Working Conditions Directive and the Work-Life Balance for Parents and Carers Directive. While some of the measures in these directives are already in place in the UK, there are some aspects which have not yet been introduced due to the delay in the employment bill, such as carers' leave. Moreover, there are other aspects which the government has not yet committed to at all, such as limits on the lengths of probationary periods (Gibson 2021).

Finally, the European Commission has recently proposed new legislation on labour and social protections which could lead to other areas of divergence. A newly proposed directive on improving conditions in platform work (typically associated with the 'gig economy') creates a legal presumption of an employment relationship for when people are doing platform work and the digital platform controls the performance of work. This would give platform workers access to the same suite of employment rights as other workers (EC 2021). The UK in a Changing Europe thinktank's 'Divergence Tracker' recognises this as a potential area of 'passive divergence' between the UK and the EU (UK in a Changing Europe 2021). The Commission has also proposed a directive on a framework for adequate minimum wages, including measures on promoting collective bargaining and ensuring effective enforcement of minimum wage protections (EC 2020).

In sum, it is hard to say with confidence whether and how the UK and the EU will diverge on labour protections in future, but there are a number of possibilities to consider. The government may modify legislation which ministers have previously critiqued, such as regulations implementing the working time directive and Temporary Agency Workers Directive; it may introduce exemptions or derogations for particular sectors or businesses; it may allow for carve-outs for employment legislation as part of its policy on freeports; or it may fall behind EU legislation aiming to strengthen labour protections in areas such as platform work.

WHERE THE EU MAY TAKE ACTION IN RESPONSE TO DIVERGENCES UNDER THE TCA

In the previous section, we identified some of the areas of labour and social policy where the UK may diverge from the EU in future. But as set out in chapter 2, the level playing field provisions on labour and social standards could operate as a constraint on future divergence. Were the UK to diverge from the EU with respect to labour protections, the EU may seek to raise a dispute under TCA Art 408-10 or apply rebalancing measures under TCA Art 411. (For ease, we refer to either of these options as the EU 'taking action' against the UK.) Crucially, the threat of retaliation from the EU – in the form of a formal complaint

or rebalancing measures – could discourage the UK from pursuing such a course in the first place.²

Yet there are a number of limits to the extent to which the TCA will in practice inhibit divergence. First, not all forms of divergence on labour standards will necessarily constitute a breach of the TCA labour provisions or justify the application of rebalancing measures. In particular, as explained earlier the non-regression and rebalancing clauses both include a requirement for there to be a link to trade or investment. While it is not clear exactly how this will be interpreted, it is likely that it will make it harder for the EU to justify taking action against the UK under the terms of the TCA.

Second, even when the EU does have a strong legal justification for taking action, it will not necessarily issue a response. Under the TCA, disputes over the level playing field can only be resolved on a state-to-state basis and so any complaint must be raised by the EU itself (rather than, for instance, individual workers or trade unions). If the EU does not consider a dispute to be in its interest, then it is unlikely to pursue a complaint, even if there is clear evidence of a breach of the labour provisions. Similarly, under the rebalancing clause, it is entirely the EU's decision to take rebalancing measures and it may choose not to if it is not in its own interests.

Given these considerations, not all forms of divergence should be judged equally. Some are more likely than others to result in the EU taking action and for this action to be successful – ie upheld by a panel of experts (or an arbitration tribunal in the case of rebalancing measures). It is therefore useful to consider what types of divergence might be particularly likely to lead to the EU successfully taking action against the UK. Based on the analysis in this briefing so far, the following list includes some factors which could be most relevant in determining whether divergence may lead to the EU successfully taking action.

- Divergence which **involves the reduction of protections** (ie deregulation) is more likely to raise problems in the context of the level playing field, compared to 'passive divergence' as a result of the UK not keeping pace with EU rules. This is because the labour non-regression clause in the TCA does not require such a significant impact on trade or investment compared with the rebalancing clause.
- Divergence which **disregards fundamental ILO rights and principles** is more likely to see the EU successfully taking action against the UK. This is because the EU could rely on the provisions on multilateral labour standards in the TCA to contest the UK's actions. These provisions do not require a trade or investment link. The EU is likely to also be particularly concerned about any threat to fundamental labour rights and principles. However, if the EU were to rely on the commitments to multilateral standards in the TCA as the basis of its complaint, there would be no scope to apply remedies (eg temporary compensation or suspension of treaty obligations). This could make it harder to enforce these provisions.

² Of course, it is also possible that the UK may raise a dispute with the EU over its application of the TCA's labour provisions or implement rebalancing measures as a result of it being disadvantaged by significant divergences in labour and social standards; but for the purposes of this briefing, we focus on the scenario where the EU is considering taking action.

- Divergence which occurs at a **sufficiently large scale** – in terms of its impact, duration, and geographical scope – is more likely to face difficulties. In particular, the repeal of major EU-derived legislation (on eg working time, atypical workers, or occupational health and safety) will in all likelihood be more problematic than targeted modifications of legislation or temporary derogations. This is because if the divergence is significant the EU is both more likely to take notice and respond and more likely to be able to demonstrate an impact on trade or investment. (See for instance paragraph 193 of the panel report for the US-Guatemala dispute, which notes that “effects may in some cases be too brief, too localized or too small to confer a competitive advantage”.)
- Divergence which **directly affects a tradeable sector (or sectors)** is more likely to elicit a respond from the EU. (Tradeable sectors typically include industries such as agriculture and manufacturing.) The reason for this is that on the face of it there is more likely to be a stronger case for demonstrating an impact on trade. This aligns with the approach of the panel in the US-Guatemala dispute.
- Divergence which **can be shown to substantially lower labour costs** is particularly likely to lead to the EU successfully taking action under the terms of the TCA. Following the logic of the panel decision in the US-Guatemala dispute, if the EU is able to evidence how divergence has had a real-world impact on competition by substantially reducing labour costs for UK employers, then its case is likely to be far stronger in the event of a dispute. To take a hypothetical example, if the UK government reduced statutory leave entitlement below the EU minimum and it could be demonstrated that employers had subsequently made substantial savings to their labour costs by cutting back on annual leave, then this could be used to make the case that the UK’s reduction in labour protections had conferred a competitive advantage on its employers, thereby breaching the non-regression commitment in the TCA.

Finally, it is important to note that, while the TCA’s non-regression clause in theory applies to some policies in the UK which are purely domestic, such as the minimum wage, it is to be expected that the EU will focus its attention on monitoring any efforts to weaken EU-derived protections. This is because the EU is unlikely to respond in relation to a policy measure which the UK could have implemented as an EU member, given the purpose of the level playing field was to guard against the risks of the UK having an unfair competitive advantage once it withdrew from the EU. Similarly, the EU is less likely to take action over issues that pre-exist Brexit (for instance, the poor resourcing of the UK’s labour inspectorates) or over matters where the EU itself is also potentially in breach.³

This analysis suggests that there are certain circumstances where divergence in labour standards will be particularly risky for the UK. The archetype case of where an act of divergence could meet with successful action from the EU is where the UK actively reduces protections by repealing an EU-derived piece of legislation (eg the working time directive) in a way which demonstrably and substantially lowers labour costs in a tradeable sector. On the other hand, if the matter at hand is one of ‘passive divergence’, if the measure is small, temporary, or localised, if it is contained to only non-tradeable

³ For instance, Ewing 2021 argues that the UK and EU member states are both in breach of ILO Convention 87 on freedom of association and protection of the right to organise.

sectors such as domestic services, or if it is hard to provide any evidence of a material impact on labour costs, then the possibility of the EU successfully taking action is lower. Ultimately, the level playing field does not provide a complete bulwark against the UK diverging from EU labour protections; but it does impose some constraints in particular circumstances, especially with respect to the most egregious acts of deregulation.

4.

CONCLUSION

This briefing has summarised how the level playing field provisions on labour rights work in the UK-EU TCA. It suggests that the provisions are likely to some extent constrain UK divergence from EU labour and social standards – whether this is ‘active divergence’ through deregulation or ‘passive divergence’ through the UK failing to keep pace with EU developments. However, the level playing field does not safeguard against all forms of divergence and the decision on whether or not to pursue a formal complaint or enact rebalancing measures is ultimately in the hands of the EU. This means that in practice the labour provisions in the TCA will be used under limited circumstances.

The analysis set out here is also instructive for considering the role of civil society organisations, such as trade unions, in promoting the level playing field and upholding the UK’s commitments on workers’ rights. It is not possible under the terms of the TCA for trade unions or other civil society organisations to directly raise disputes about alleged breaches of the labour provisions. However, they can play an indirect role through domestic advisory groups and informal channels (see Ortino 2022). The analysis in the previous chapter suggests that the EU is particularly likely to take action against the UK where divergence actively reduces protections, disregards fundamental ILO rights and principles, is of a sufficiently large scale, directly affects a tradeable sector such as manufacturing, and/or can be shown to substantially lower labour costs. This indicates that civil society scrutiny of the level playing field should focus in particular on considerations such as these.

Looking ahead, the UK government’s proposed review of retained EU law is likely to shed more light on its post-Brexit plans for regulatory reform and their implications for labour and social protections. Whether the government seeks to diverge from EU labour standards, either actively or passively, and whether the EU will respond through the TCA’s level playing field provisions, ultimately still remains to be seen.

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IPPR
14 Buckingham Street
London
WC2N 6DF
T: +44 (0)20 7470 6100
E: info@ippr.org
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