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Non-regression and environmental legislation in the future EU-UK relationship

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1 Introduction

Both sides in the Brexit negotiations, the EU and the UK, have now identified the need for the agreement on the future relationship to include robust non-regression provisions on issues including environmental legislation. This has been an element of the EU negotiating position from the beginning[1]; and was echoed in the UK's July 2018 White Paper on the future relationship[2].

There are two key issues which need to be addressed to deliver the EU and UK negotiating objectives, with some overlap between them. The first is how to determine equivalence in terms of ambition, concrete requirements and stringency when comparing future regulatory regimes. The second is how to specify the commitment to avoid regression from those equivalent standards. On the assumption that the future relationship will apply mutual commitments, this commitment should apply equally to regression by the EU as to regression by the UK.

The simplest and best way to ensure a level playing field on environmental standards would be to commit to a dynamic alignment, taking the existing EU acquis as a minimum baseline, but with flexibility for the UK or the EU to be more ambitious if it so chose (equivalent to the existing flexibility on environmental standards allowed to Member States under the Treaty). Avoiding UK regression could be achieved by the UK committing to retain at least the existing EU acquis, and replicating in full the stringency of current arrangements for its enforcement.

However, these approaches would not meet the UK's current negotiating preferences for the future relationship. The White Paper on the Future Relationship makes it clear that, while the UK intends to commit to a "common rulebook" in respect of standards for goods[3] (with some environmental implications), it aims to rely on non-regression and the demonstration of "equivalence" in other regulatory areas.

If this remains the UK's position, it will require clear and careful drafting in the eventual treaty setting out the future relationship. In order to deliver the two distinct, though related, objectives of equivalence and non-regression in relation to the environment, we need both short-term clarity on the objectives, followed by precision on how they will be delivered. The first need is for clear language in the political declaration on the future relationship, setting out what the negotiators should aim to achieve; the second need is for legal text in the eventual future relationship agreement itself. The latter is where full precision will be needed. The political agreement, however, needs to be sufficiently precise to ensure that there is

[1] The negotiating guidelines adopted by the European Council in April 2017 included the requirement that a future trade agreement with the UK "must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices." This was further elaborated in the guidelines adopted in March 2018.

[2] "The Future Relationship between the United Kingdom and the European Union", Cm 9593, July 2018

[3] And even here, the scope of the commitment is unclear, since it seems to include only "those rules that must be checked at the border" (section 1.2.4, paragraph 35)

confidence on both sides of the negotiations about what the agreement should aim to achieve, and the level of detail it will require.

This paper focuses on the narrow, but central, issue of avoiding competitive deregulation. There are other environmental and regulatory issues which will need to be addressed, in particular regulatory cooperation in the development of future laws[4], or dynamic implementation of existing laws (for example, new standards agreed under the Industrial Emissions Directive for what constitutes Best Available Technology); cooperation on international environmental and sustainable development issues; and the application in the UK of the environmental principles set out in the EU Treaties; but they are not covered here. Nor have we tried to define in detail the areas of environmental legislation that will need to be included, although earlier work by IEEP has recommended a wide coverage, including air, water, and nature legislation[5]. Key elements of climate legislation (the Emissions Trading System and the Effort Sharing Decision) will require tailored solutions to the equivalence issue, given the nature of the current Europe-wide approach to establishing and meeting mitigation targets.

[4] There is considerable scope for divergence in standards to emerge in practice, particularly as either the EU or the UK develop new policies to address increasingly urgent environmental challenges. The UK's White Paper sets out some proposals for regulatory cooperation, although it is unclear that the EU will find it attractive to give an ex-Member State the sort of level of influence envisaged in these proposals.

[5] See Nesbit M and Baldock D, "Brexit and the Level Playing Field: Key Issues for Environmental Equivalence", IEEP, May 2018: https://ieep.eu/publications/brexit-negotiations-equivalence-environmental-standards-and-risks

2 The precedents

Non-regression clauses in respect of environmental standards have been agreed in existing (and planned) EU bilateral trade agreements; but they are insufficiently developed or detailed for the purposes of the agreement with the UK, bearing in mind the current level of market integration, the geographical proximity, and the current high level of regulatory alignment between the two parties. For trade agreements with other parties (for example, between the EU and Korea, or between the EU and Canada) with widely divergent regulatory systems, regulatory alignment is clearly difficult to achieve, and comparison between the stringency of the respective regimes is more challenging and debatable. For this reason, a commitment to avoiding new competitive distortions as a result of weakening standards is, up to now, as much as has been seen as feasible for negotiators. However, more precision is needed to interpret a concept like "non-regression" when there is currently a high degree of regulatory alignment. Given that the UK and the EU start from the same regulatory baseline in matters covered by the EU acquis, maintaining equivalence with that baseline is an achievable benchmark against which to judge whether regression has occurred.

The non-regression text in CETA, the EU-Korea agreement, and the EU-Japan agreement, together with the EU's draft text for the Transatlantic Trade and Investment Partnership with the US, are set out in Annex 1. In all three cases, the text simply requires that the parties should not derogate from, or fail to fully enforce, their environmental law in order to attract investment. As far as changes in environmental law are concerned, the parties merely "recognise" that it is inappropriate to do so in order to encourage trade or investment. It would be difficult for either Party to enforce these provisions against the other Party[6]; they would have to demonstrate that the purpose of any derogations or failure to enforce was to encourage trade or investment; and in any case there is no specific obligation in respect of a wholesale weakening of a Party's environmental law.

[6] Indeed, we are not aware of any instances of non-regression commitments being enforced in existing trade deals

3 What the Brexit agreement needs

3.1 What do we mean by non-regression?

These existing FTA examples, or similar provisions, are therefore clearly insufficient to avoid the risk of a weakening of environmental protection in the UK that has the effect of providing a competitive advantage (regardless of the real or purported intention). Moreover, even a generally framed commitment that environmental protection will not be weakened would not provide sufficient clarity on what constitutes a "weakening". While the stated aims of the EU negotiators, as set out in the European Council's guidelines and echoed in the European Parliament's resolutions, are to "prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection", many stakeholders would want to see a broader commitment to avoid any reduction in environmental protection, not least given the cross-border nature of many of the environmental issues that the legislation currently tackles.

In practice, in any case, it would be simpler and more straightforward to frame commitments around avoiding regression, rather than to link them to a need for proof against more debatable concepts like the intention or the effect in terms of competition. Disputes would be easier to address and the prospects for enforcement potentially improved. Given the political commitments from both sides on the importance of maintaining high standards, this approach should be both non-controversial, and more straightforward to implement than the alternatives.

A definition of a regression in environmental protection is therefore needed; without the need for text on assessing the purpose of any such regression.

3.2 What aspects of environmental legislation need to be addressed?

There are two facets of a weakening of environmental legislation that can be identified, and which need to be guarded against:

- a reduction in the level of protection the legislation aims to achieve;
- a reduction in the effectiveness of the mechanisms to deliver the level of protection aimed at.

Without the second of these two elements, there is a risk that legislation with declaratory and unenforceable statements of intention or ambition could be used to mask a significant weakening in practice of environmental standards. EU legislation on the environment (and thus, the body of current law that the UK will inherit) has a wide range of forms. They are primarily Directives but include a number of Regulations and Decisions. The type of provisions they contain vary depending on their purpose, the environmental medium or issue regulated, and the level of flexibility over implementation offered at Member State level. In most cases, however, the legislation contains both provisions on the environmental outcomes to be aimed at or attained; and, on the other hand, process provisions which enable an assessment of whether a Member State is taking measures to ensure the achievement of those outcomes.

For example, the Landfill Directive established both a range of future targets for reductions in the landfilling of biodegradable waste, and a more immediate requirement on Member States to establish and implement strategies for achieving those targets; air quality legislation sets the standards to be achieved, but also includes detailed monitoring requirements, and clear duties on Member States in the event of exceedances of the standards. Annex 2 provides further details in two example policy areas.

The future relationship therefore needs to address both standards and process requirements, to avoid the risk that the UK (or the EU) in future legislates in principle in a way which appears to maintain standards, but then so weakens its obligations in terms of delivery and enforcement that a significant reduction in protection results.

3.3 What other factors need to be considered?

In addition to defining non-regression by reference to the legislation applying in the EU and in the UK, the arrangements for ensuring that the legislation is applied in practice need to be considered. The governance mechanisms of the EU, including the roles of the European Commission and the Court of Justice in ensuring that legislation is properly and consistently applied, are an essential component of the stringency of its environmental legislation in practice; and therefore future environmental governance arrangements in (and throughout) the UK are an important element in defining equivalence.

EU Member State implementation of environmental legislation remains patchy, as recognised by the focus on improved implementation in the 7th Environmental Action Programme, and by the Commission's Environmental Implementation Review. And the risk of weaker UK enforcement of environmental standards, once it no longer has the oversight of the European Commission and the threat of sanction by the European Court of Justice, has been acknowledged by the UK Government. The text should therefore include clear requirements on governance and enforcement, including reference to the rights set out in the Aarhus Convention on access to information, public participation and access to justice in environmental matters[7].

It will also be desirable for the text on environmental issues to fit with the approach adopted for the other areas where EU negotiators are aiming to avoid competitive distortions (tax, social, data protection legislation, as well as state aid and competition policy); although for the latter two areas the concept of non-regression is less central. However, it will be important to maintain the freedom to legislate of both parties, in line with the existing Treaty provisions allowing Member States to introduce more stringent and ambitious environmental legislation if they so choose.

Finally, the agreement may need to address the issue of devolved decision-making in the UK, to reflect the fact that environmental policymaking is mainly carried out at the level of the UK's constituent nations and provinces (England, Scotland, Wales and Northern Ireland).

[7] See the analysis in Nesbit M, Ankersmit L, Friel A and Colsa A: "Ensuring compliance with environmental obligations through a future UK-EU relationship", IEEP, London 2017

Whilst, as a matter of principle, the agreement should not interfere in the UK's internal governance arrangements, in practice EU negotiators will need to be satisfied that the UK will, collectively, be able to deliver on the non-regression elements of the agreement.

3.4 How will non-regression commitments be enforced?

The commitments on non-regression and equivalence will need to be enforced bilaterally between the EU and the UK. The UK's recent White Paper makes a number of proposals for institutional arrangements; for dispute resolution, these rely on a bilateral Joint Committee, the option of arbitration in the event of failure to resolve a dispute, and, ultimately, the sanction of disapplying the relevant area of the agreement (an approach which appears to be based on the similar provisions in the European Economic Area Agreement). It will be important for all issues concerning the level playing field – including state aids, competition issues, labour regulation and environmental regulation – to have the same, robust, mechanisms for bilateral enforcement.

However, such approaches are difficult to apply in practice in bilateral agreements, where each party holds equal power over the outcome of discussions, so can prevent any finding of fault[8]. This suggests that the best approach to ensuring enforcement is for the future agreement itself (and any legislation adopted domestically in the UK to give force to the agreement) to incorporate clear obligations on the need for effective domestic enforcement mechanisms; which would also help address the risks of weaker environmental legislation through weaker delivery and enforcement that we identify above. Such obligations could include a requirement for "equivalent" legislation to include legally enforceable mechanisms which would allow the public and any enforcement bodies to hold Governments across the UK to account. The UK Government's proposals for a new watchdog for environmental legislation in England are therefore a helpful step; although the proposals need to be significantly strengthened to be effective in practice, and similar mechanisms for the devolved administrations (or voluntary devolved nation participation in the proposed UK body) need to be developed.

The mutual confidence necessary for a non-regression agreement to work well would be enhanced by ensuring continued transparency on environmental performance. A UK commitment to continued membership of the European Environment Agency, and to provide the information necessary for comparative assessment of environmental performance and environmental outcomes, would therefore be a positive step.

[8] Ibid

4 Conclusion

A number of pressures could lead to a divergence in environmental standards post-Brexit. The urgent risk that needs to be guarded against is that of a reduction in the current level of environmental protection. This is clearly a relevant concern for the EU27 in relation to the UK, especially if the UK pursues far-reaching trade deals with third countries which have a more deregulatory approach to the economy. However, it also can be anticipated that the UK could be more aware of, and sensitive to, any future regression on the EU side than most of the EU's other trading partners. This is because of the high level of familiarity with the EU acquis in the UK, and the potential impacts on the UK as a neighbouring economy with generally the same environmental standards at present. Were the UK to embark on an ambitious environmental agenda itself, as its current Government suggests, its sensitivity to possible regression on the part of the EU may increase, particularly in areas of legislation which are politically important in the UK.

The downside risks of competitive deregulation must be avoided; but if negotiators on both sides can get the right agreement on environmental standards, we will also avoid competitiveness concerns acting as a constraint on future environmental policies. This would be a significant gain. We should aim to create the conditions for a virtuous circle of competition between different approaches to the ambitious environmental policies which are needed both to tackle growing environmental pressures, and to deliver the high levels of environmental protection that the UK and EU public demand.

Annex 1 Non-regression provisions in existing trade agreements and draft agreements

CETA

Article 24.5
Upholding levels of protection

1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.
2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.
3. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment.

EU/Korea

Article 13.7
Upholding levels of protection in the application and enforcement of laws, regulations or standards

1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

2. A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.

EU/Japan

Article 16.2
Right to regulate and levels of protection

1. Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection.

2. The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To

that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

TTIP

The EU's position paper on the Trade and Sustainable Development chapter contains the following explanatory text:

"IV. Trade and Sustainable Development – horizontal issues

1. Upholding levels of protection

This article would include the following key elements:

1) the recognition that it is inappropriate to attract trade or investment by weakening or reducing the levels of protection embodied in domestic environmental or labour laws;

2) the commitment by each Party not to waive or derogate, or offer to do so, from the domestic environmental and labour laws it has set, in a manner that affects, or with a view to encouraging, trade or investment;

3) the commitment by each Party not to fail, through a sustained or recurring course of action or inaction, to effectively enforce the domestic environmental and labour laws it has set, in a manner that affects, or with a view to encouraging, trade or investment."

Annex 2 Examples of environmental standards and process

Water Framework Directive:

Standards: The Water Framework Directive (WFD) (2000/60/EC) establishes a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater. The Directive sets a general requirement for achieving good levels of "ecological" and "chemical" status by all relevant waters by a defined deadline (depending on the type of water and designation), and mandates that no water bodies are to experience deterioration in status from one class to another. Good ecological status is defined as the state of the system in the absence of any anthropogenic pressures, or a slight biological deviation from what would be expected under undisturbed/reference conditions. Chemical status is defined in terms of compliance with all the quality standards established for chemical substances at European level.

Process: The WFD is implemented through a system of water management based on river basins—the natural geographical and hydrological unit—instead of according to administrative or political boundaries. A "river basin management plan" (RBMP) is developed for every river basin; it must be updated every six years by the competent authority as part of a cyclical process of implementation and improvement. Member States must encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the RBMPs through open comment and publication of draft plans. Each plan is required to set out a detailed account of how the objectives set for the river basin (ecological status, quantitative status, chemical status and protected area objectives) are to be reached within the timescale required. The plan must include: the river basin's characteristics, a review of the impact of human activity on the status of waters in the basin, estimation of the effect of existing legislation and the remaining "gap" to meeting these objectives; and a set of measures designed to fill the gap.

Each Member State is responsible for developing and implementing a "programme of measures" (PoM), divided into mandatory "basic" measures required in all plans and laid out in related EU legislation such as the Nitrates Directive and Urban Waste Water Treatment Directive, and "supplementary" measures designed to overcome the "gap" in meeting the individual objectives of RBMPs. Member States must submit an interim report describing progress in the implementation of the planned programme of measures within three years of the publication of each RBMP.

Risks associated with not specifying process requirements: The standards themselves have an element of judgement associated with them. It would be possible for UK legislation to set out the same broad standards as in the Water Framework Directive, but without specifying what action was required to achieve them, and without specifying what was required in the event of the standards not being met. In both cases, the effectiveness of the legislation would be significantly compromised, and the UK would de facto be operating to a less stringent requirement.

Air Quality Directive

Standards: The Air Quality Framework Directive (2008/50, repealing and replacing earlier legislation) has a detailed hierarchy of standards for sulphur dioxide, nitrogen oxides, particulates, lead, benzene and carbon monoxide, which are closely linked to the process requirements detailed below. The limit values are also framed in terms of the dosage periods relevant to the objectives, in terms of, for example, human health, or the protection of vegetation, with many pollutants having (for example) different limit values for hourly, daily, and yearly value. Table 1 below sets out as an example the limit values for large particulate matter (PM10), and Table 2 sets out the limit values for ozone. In addition, the directive sets out threshold values which determine monitoring requirements, and alert thresholds, which require steps to be taken to inform the public, and notification of the Commission.

Table 1 - Limit Values for PM10

Objective	**Averaging period**	**Value**
24 hour limit value for the protection of human health	24 hours	50 μg/m^3 PM10, not to be exceeded more than seven times a calendar year
Annual limit value for the protection of human health	Calendar year	20 μg/m^3 PM10

Table 2 - Limit Values for Ozone

Objective	**Period**	**Value**
Target value for protection of human health	Maximum daily eight-hour mean	120 μg/m^3 not to be exceeded on more than 25 days per calendar year average over three years
Target value for the protection of vegetation	AOT40, calculated from one hour values from May to July	18,000 μg/m3 h averaged over five years
Long-term objective for the protection of human health	Maximum daily eight-hour mean within a calendar year	120 μg/m^3
Long-term objective for the protection of vegetation	AOT40, calculated from one hour values from May to July	6,000 μg/m3 h

Process: As noted above, the limit values, while representing the minimum standards aimed at by the legislation, are closely linked to a range of process requirements. In the first place, exceedance of the threshold values triggers a requirement for **detailed monitoring** in relevant zones and agglomerations. Exceedance of the alert values requires urgent **public information measures**. Exceedance of the limit values themselves triggers a range of requirements. Some hourly and daily limit values have an allowed number of exceedances each year, in recognition of the likely variability of measurements.

Where there is an identified risk of limit values, including the relevant tolerances, being exceeded, competent authorities are required to draw up action plans with short-term measures to reduce the risk. Where limit values are in fact exceeded, competent authorities are required to draw up **action plans** which set out the steps to be taken to bring the zone into compliance; and where more than one pollutant was concerned, integrated plans covering the relevant pollutants together were necessary. A number of requirements are set

out for the action plans, including public access and involvement, and a scrutiny role for the Commission.

Risks associated with not specifying process requirements: Fixing the same air quality standards, but without specifying the steps necessary in the event of exceedances, would mean that the real level of stringency of the UK legislation was difficult to determine. It could be either significantly more stringent, if the UK courts chose to interpret the standards as an absolute obligation on public authorities. A more likely outcome, given the UK's approach to exceedances in London, highlighted by the successful Client Earth legal cases, would be either that the limit values were treated as a broad objective, without a requirement for detailed action plans to attain them; or that action plans were not drawn up with sufficient rigour and ambition to allow the standards to be met.