



BRIEFING PAPER

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The UK-EU future relationship negotiations: Level playing field

By Ilze Jozepa, Stefano Fella, Steve Browning, Antony Seely, Daniel Ferguson, Louise Smith, Sara Priestley

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Summary

Following the UK's withdrawal from the EU on 31 January 2020, the UK and EU adopted negotiating objectives for their future relationship in February and began negotiations in March with the aim of securing agreement on their new partnership by the end of the year. Alongside the Withdrawal Agreement, the UK and EU agreed a Political Declaration (PD) which set out their joint commitment to an ambitious and wide-ranging economic partnership. This would include a free trade agreement, as well as wider sectoral cooperation.

The PD included a commitment to a "level playing field" to ensure "open and fair" competition, but the precise nature of commitments would be "commensurate with the scope and depth of the future relationship". One of the central issues in the future relationship negotiations will be finding an agreement on commitments which could secure a level playing field in trade relations between both parties. This is viewed as an issue that could make or break the negotiations.

The purpose of level playing field commitments in trade agreements is to ensure that competition is open and fair and that businesses in one trading partner do not gain a competitive advantage and undercut their rivals from the other by avoiding the costs of more stringent regulations.

The EU and UK have begun the negotiations with fundamentally different approaches to the level playing field. The EU has said that it will only agree a free trade deal with zero tariffs and zero quotas if the UK agrees to level playing field commitments in the areas of state aid, competition, tax, workers' rights, environmental protection and climate change. It is seeking legally binding commitments, with EU standards as a reference point, subject to strong enforcement mechanisms domestically and within the treaty governance framework.

The UK Government says it will maintain the highest standards in these areas but that it will not agree to obligations that go further than commitments the EU has agreed with countries like Canada, Japan and South Korea. But the EU says that the UK's geographic proximity and the volume of UK-EU trade means that deeper commitments are required.

Commentators have suggested that some level playing field areas could be less controversial than others. For example, at this point there is no indication that it will be difficult to find an agreement on matters of taxation and limiting anti-competitive behaviours of businesses. The Government has also said that its policy is not to lower labour, social and environmental standards or change regulations. In these areas, the EU is not asking the UK to adopt new EU rules but to maintain the current level of protection.

On state aid, where the EU is asking the UK to stay aligned with EU rules, a compromise seems more difficult to achieve at this stage as the EU wants the UK to follow both existing and future rules.

This paper provides an overview of the issue and negotiations (section one) before examining each of the level playing field areas in turn: the rules on state aid, business competition and state-owned enterprises, taxation, labour standards, environmental protection and climate change. It discusses the background developments and the respective UK or EU negotiating positions in each area. It also takes stock of various views on the scope for a "landing zone" of potential compromise in each area. These include views on the potential for the UK to further its own global trading interest through its deal with the EU.

1. Level playing field: overview of issue and negotiations

The issue of a level playing field is a controversial one which has the potential to become a make-or-break issue early in the negotiations on the future UK-EU relationship, with the two sides taking fundamentally different approaches.¹

The EU has said that it will only agree a free trade deal with zero tariffs and zero quotas if the UK agrees to level playing field commitments in the areas of state aid, competition, tax, environmental protection and workers' rights.² The UK Government says it will not agree to be bound by such provisions.

Prime Minister Boris [Johnson maintains](#) that such guarantees are not needed as the country is seeking a free trade agreement (FTA) similar to those the EU has agreed with other countries.

There is no need for a free trade agreement to involve accepting EU rules on competition policy, subsidies, social protection, the environment, or anything similar any more than the EU should be obliged to accept UK rules.

The UK will maintain the highest standards in these areas – better, in many respects, than those of the EU – without the compulsion of a treaty.

And it is vital to say this now clearly because we have so often been told that we must choose between full access to the EU market, along with accepting its rules and courts on the Norway model, or a free trade agreement, which opens up markets and avoids the full panoply of EU regulation, like the Canada deal.

Well folks I hope you've got the message by now.

We have made our choice: we want a comprehensive free trade agreement, similar to Canada's.

Commentary on the negotiations has highlighted that the negotiations could fail over two key issues, level playing field and fisheries (with the EU also making an agreement on fisheries a condition of a wider trade deal). [Borderlex](#) trade news service quotes Sir Ivan Rogers, former UK Permanent Representative to the EU on the importance of an agreement in this area:

[The] Level Playing Field is the really difficult one and that's where it can all fall apart ...

I think there is a major crisis coming in Q3 and Q4 [referring to the third and fourth quarter of this year] ... a major crunch, with real risk. Both sides may well threaten to walk out. Probably this side of next summer.

Crucially, the UK government is not against maintaining high standards in areas such as social or environmental protection, but rejects the form

¹ See Alex Stojanovic, "[A bumpy level playing field awaits the next round of Brexit talks](#)", Institute for Government, 16 January 2020

² [European Commission internal slides](#), 14 February 2020, p4; "[Michel Barnier: Johnson agreed last year to stick to EU rules](#)", *The Guardian*, 3 February 2020

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of the commitments proposed by the EU. The Chancellor of the Duchy of Lancaster Michael Gove [said](#) in the House of Commons on 27 February 2020:

We will not dilute any existing protections. [...] We do not need the EU's permission to be a liberal nation leading the world in the fight against climate change and for social progress. That is why the UK Government seek an FTA with robust protections for the environment and labour standards, but we do not see why the test of suitability in those areas should be adherence to EU law and submission to EU models of governance.³

After the first “constructive” round of negotiations in the first week of March, the EU's chief negotiator Michel Barnier [confirmed](#) with regard to level playing field that both sides had the ambition to maintain high standards, but two difficulties remained. The UK did not wish to translate these commitments into a joint agreement, and nor did it want appropriate mechanisms to ensure compliance.⁴

The EU's Free Trade Agreements with other countries do include various provisions to uphold regulatory standards or [a 'level playing field element'](#). As explained in the *Financial Times*:

The Canada deal, known as CETA, includes commitments by both sides not to weaken workers' rights; Brussels is in the middle of a dispute settlement process with South Korea over what it alleges is Seoul's violation of commitments to uphold International Labour Organization standards; and the EU's trade deal with Japan contains a promise to honour the Paris climate agreement.⁵

The [Comprehensive Economic and Trade Agreement](#) (CETA), the [EU-Japan Economic Partnership Agreement](#), and the [EU-South Korea free trade agreement](#) contain provisions which limit trade-distorting government subsidies. These commitments [expand on the existing WTO rules](#) in this area.

However, the Commission has said that the [commitments in its other FTAs offer insufficient](#) safeguards for the UK-EU partnership as no other country outside the EU enjoys tariff-free and quota-free access to the single market.⁶ The EU also maintains that proximity of the UK and EU markets and the volume of trade between them require rigorous level playing field arrangements. This premise is rejected by the Government.

In his statement on the UK's negotiating objectives on 27 February, Gove noted that the volume of US-EU trade was similar but that the EU had not sought a role in US standard setting in previous trade negotiations. Furthermore, he said:

proximity is not a determining factor in any other FTA between neighbouring states with large economies . . . We need only look at the United States-Mexico-Canada agreement for an example of

³ HC Deb 27 February 2020, c469

⁴ Speech Michel Barnier, the European Commission's Chief Negotiator, [Points of convergence and divergence following the first round of negotiations](#), 5 March 2020

⁵ ["Johnson's free trade vision hits familiar sticking points"](#), *Financial Times*, 4 February 2020

⁶ ["Cracks appear in Britain-EU talks over free-trade agreement"](#), *The Telegraph*, 20 January 2020

a trade agreement that does not require regulatory alignment to one side's rules or demand a role for one side's court. Geography is no reason to undermine democracy.

To be clear, we will not be seeking to align dynamically with EU rules on EU terms governed by EU laws and EU institutions.⁷

Commons Library briefing CBP-8834 [The UK-EU future relationship negotiations: process and issues](#) (pp 40-41, 44, 71) gives a more detailed overview of the political debate and the statements of UK and EU official representatives before the start of the negotiations.

Some level playing field areas could be **less controversial** than others. At this point there is no indication that it will be difficult to find an agreement on matters of taxation and limiting anti-competitive behaviours of businesses. The Government has also said that its policy is not to lower labour, social and environmental standards or change regulations "[for the sake of divergence](#)".⁸⁹ In these areas, the EU is not asking the UK to adopt new EU rules but to maintain the current level of protection. On state aid, where the EU is asking for continuing UK alignment with EU rules, a compromise seems more difficult at this stage. In all areas, an agreement could potentially be found on a form of guarantee that would satisfy EU demands.

If both Parties find a common 'landing zone', the negotiation will be complex and **time consuming**. The EU is seeking hard guarantees from the UK that it will live up to its commitments. It wishes to establish "adequate mechanisms to ensure effective implementation domestically, enforcement, and dispute settlement, including appropriate remedies".¹⁰ But such mechanisms do not exist now and have to be invented.¹¹ The time constraints do not work in favour of finding an agreement.

1.1 Defining a level playing field

The term "level playing field" and its definition has been somewhat controversial, with UK sources suggesting that the concept of a level playing field is an EU invention. The Government's command paper of 27 February 2020 setting out the UK's negotiating objectives for the future relationship makes no mention of the level playing field concept. *The Times* has reported that, in the opening phase of the negotiations, the UK and EU negotiators [disagreed about the terminology](#) to be used in the talks:

⁷ HC Deb 27 February 2020, c469

⁸ [HC Deb 19 October 2019](#) vol. 666 c602

⁹ "[Sajid Javid seeks to placate business over post-Brexit rules](#)", *Financial Times*, 23 January 2020

¹⁰ EU General Affairs Council, [Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland](#), 5870/20, 25 February 2020, paras 94-133

¹¹ "[Brussels to fight tough on state aid in post-Brexit talks](#)", *Financial Times*, February 2020

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There has been a stand-off between the two, with the EU wanting to use “Level playing field” to describe one section of the talks while the UK prefers “Open and fair competition”.

Both sides will now discuss their obligations under a proposed trade deal in a working group called: “Level playing field for open and fair competition.”

There is no standard definition of a level playing field. As a trade policy term, it generally refers to a set of rules and standards which are deemed equivalent and must ensure fair competition between trading partners.¹²

The purpose of ‘level playing field’ commitments is to ensure that competition is open and fair and that businesses in one country do not gain a competitive advantage and undercut their rivals in another country by avoiding the costs of more stringent regulations. Dr Lorand Bartels, Reader in International Law at Cambridge University summarised the concept in a House of [Lords evidence session on level playing field](#) on 27 February:

The point is that the level playing field is essentially about ensuring that the other side raises costs to your levels. You can dress it up as values, but really it is hard-nosed economics at its best.¹³

Most free trade agreements contain provisions of some sort to uphold certain (international) labour or environmental standards or include pledges to maintain open competition. Through these clauses, which are sometimes called ‘non-regression clauses’, parties agree their respective levels of commitment. The enforcement mechanisms are generally weak but can be supported with trade sanctions if one of the parties violates its commitments.¹⁴

In the context of the EU internal market, level playing field provisions mainly refer to common rules on competition, state aid, the environment and social rights. These provisions are at the core of the single market regulations.

With regard to the future relationship with the UK, the EU introduced the notion of a level playing field in its policy documents early on in the withdrawal negotiations.¹⁵ EU officials have reiterated that in return for deep access to the single market, the UK would have to accept certain level playing field arrangements.¹⁶ The Political Declaration on the framework for the future EU-UK relationship roughly defines the scope of these requirements (see section 1.3 below).

¹² “[UK–EU future relationship: level playing field](#)”, explainer, *Institute for Government*, 17 February 2020 (accessed on 15 March 2020); [OECD website](#) (accessed on 13 March 2020)

¹³ HL EU Internal Market sub-committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q1

¹⁴ *Ibid.*, Q3, Q7

¹⁵ This was referred to in the European Council’s [Brexit negotiating guidelines](#) in April 2017, and its [guidelines on the framework for the future EU-UK relationship](#) in March 2018. See also European Commission slides, [Internal EU27 preparatory discussions on the future relationship: “Level playing field”](#), 14 February 2020

¹⁶ [European Commission internal slides](#), 14 February 2020, p4; “[Michel Barnier: Johnson agreed last year to stick to EU rules](#)”, *The Guardian*, 3 February 2020

Level playing field versus regulatory standards on products

In public debate, there has been some confusion as to what the level playing field commitments refer to. Trade expert Sam Lowe of the Centre for European Reform notes that the EU is for the most part not asking the UK to make regulatory commitments on product standards but rather on preventing deregulation in specific areas and increased state financial support:

There has been some additional confusion about the concept of regulatory divergence in the recent Brexit debate. [...] But it is important to note that the areas in which the EU has asked the UK to make regulatory commitments do not on the whole relate to the standards of products. Rather, the EU is focusing on preventing the UK from deregulating or increasing state financial support to make British industry more competitive than companies based in the EU-27. And compliance will not be rewarded with fewer regulatory hurdles to trade; it is simply a necessary condition to secure an FTA and the removal of tariffs and quotas.¹⁷

A possible exemption to this general approach is the reference to “health and product sanitary quality in the agricultural and food sector”, which EU Member States included in the final draft of the EU negotiating directives. This did not appear in the draft originally produced by the European Commission (see section 1.5 below).

On the differences between regulatory alignment and product regulations see section 4.5 of Commons Library briefing, CBP-8834 [The UK-EU Future relationship negotiations: process and issues](#).

1.2 The EU’s position during the withdrawal negotiations

In its recent trade agreements, for example with Japan, the EU has negotiated commitments not to relax or lower the existing level of protection. However, the EU’s March 2018 [guidelines](#) on the framework for future relations with the UK indicated that it would be seeking to go further in this regard, given the UK’s geographical proximity and economic interdependence with the EU.

The March 2018 guidelines stated that the EU was ready “to initiate work towards a balanced, ambitious and wide-ranging free trade agreement insofar as there are sufficient guarantees for a level playing field”, and that “any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level playing field”. The guidelines highlighted the UK’s “geographic proximity and economic interdependence with the EU27” which meant that “the future relationship will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level playing field”. It went on:

The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, tax, social,

¹⁷ Sam Lowe, “[Flexibility does not come for free](#)”, Centre for European Reform, 16 January 2020

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environment and regulatory measures and practices. This will require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness.

Level playing field commitments in the areas of social and employment rights, environmental protection, tax, state aid and competition were included in the “backstop” provisions of the November 2018 Withdrawal Agreement. These were complementary to the envisaged UK-EU “single customs territory” which would have come into force if no other solution could be found to prevent a hard border on the island of Ireland by the end of the post-Brexit transition period (the end of 2020 or possibly an additional one or two years if the transition period was extended).

The EU wanted the LPF provisions in the November 2018 Withdrawal Agreement because the [Protocol on Ireland/Northern Ireland](#) provided for the whole of the UK to remain in a single customs territory with the EU at the end of the post-Brexit transition period if no future relationship agreement of Ireland was ready for implementation. EU negotiators were concerned that a single customs territory would allow the UK to trade with the EU tariff-free and that without the LPF provisions, the UK would be able to compete with the EU by lowering regulatory standards while retaining tariff-free access.

The provisions on level playing field would have, in the EU’s view, [served as a basis on which to develop a future UK-EU relationship](#). However, Boris Johnson wrote in a letter to Jean-Claude Juncker on 3 October 2019 that the previous view of the backstop as “a bridge to a proposed future relationship with the EU in which the UK would be closely integrated with EU customs arrangements and would align with EU law in many areas” was “not the goal of the current UK Government”.¹⁸

Reflecting the changed UK government’s position, the revised October 2019 Withdrawal Agreement scrapped the “backstop” provisions, replacing them with a more permanent solution to prevent the emergence of a hard border on the island of Ireland. The revised Agreement therefore no longer contains “level playing field” (LPF) provisions.

The original version of the Political Declaration (PD) on the framework for the future UK-EU relationship agreed in November 2018 committed the UK and EU to building on the WA’s LPF provisions in the future relationship agreement. But as the revised version of the Withdrawal Agreement agreed in October 2019 no longer contained LPF provisions in the Protocol on Ireland/Northern Ireland, the PD could no longer refer to these provisions as a framework to build upon. To compensate for this, the revised PD of October 2019 included more detailed wording on the level playing field.

¹⁸ Prime Minister’s [letter](#) to Jean-Claude Juncker, 2 October 2019

Further reading

Commons Library Briefing Papers: CBP-8713 [The October 2019 EU-UK Withdrawal Agreement](#); and CBP-8714 [Revisions to the Political Declaration on the framework for future EU-UK relations](#)

1.3 Political Declaration

[The Political Declaration](#) (PD) which accompanies the Withdrawal Agreement signed in October 2019 forms the starting point for the UK and EU negotiations on level playing field.

The PD provides a framework for the UK and EU future relationship, but the parties are not legally bound by its provisions. In agreeing the PD, both sides committed to the broad principles of open and fair competition that will underpin their economic partnership. The details of the commitments would however have to be elaborated during the negotiations of the free trade agreement.

The text says that “the precise nature of commitments should be **commensurate with the scope and depth of the future relationship** and the economic connectedness of the Parties”, meaning that a decision would be taken during the negotiations on the future relationship as to what level of commitments matches the new partnership.

The PD sets out that the UK and EU are aiming to agree “an ambitious, wide-ranging and balanced economic partnership”. This will encompass a free trade agreement, as well as wider sectoral cooperation, and will be underpinned by level playing field provisions “for open and fair competition.”

Chapter XIV of the Political Declaration on the level playing field begins by referring to the geographical proximity and economic interdependence of both markets. It states that the UK and the EU have agreed that their future economic partnership must be based on open and fair competition. This would be ensured by “robust commitments” to a “level playing field” – upholding the common high standards applicable in 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**.¹⁹

The UK and EU stated in the Political Declaration that distortions of trade and unfair competitive advantages would be prevented by agreeing at least not to regress below the common EU and international standards which would be in place at the end of the transition period in several areas of law. 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

¹⁹ [Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#), 17 October 2019

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- maintain environmental, social and employment standards at the current high levels provided by the existing common standards.

The level playing field would be supported by **appropriate mechanisms to ensure effective domestic implementation, enforcement mechanisms and dispute settlement.**

As noted in section 1.2 above, the wording of the Political Declaration was reinforced as compared to the version agreed by Theresa May's Government given heightened EU concerns, that the UK could seek to [compete economically](#) with the EU by adopting different regulatory standards. This followed indications from Boris Johnson that he would seek a free trade agreement without the levels of regulatory alignment envisaged under his [predecessor](#).²⁰

1.4 UK objectives for negotiations

The Prime Minister's [written statement of 3 February 2020 on UK-EU relations](#) sets out that the UK is seeking a comprehensive free trade agreement which covers substantially all trade. But the Government **does not believe that to secure such an agreement, it is necessary to be bound** by an international treaty or guided by shared institutions in other areas, like competition and subsidies policy, the environment and social policy. Such commitments could hamper its aspirations to develop "separate and independent policies" in these and other areas.²¹

The Government wants its commitments to high national and international standards and fair competition in areas of "competition policy, subsidies, environment and climate, labour and tax" recognised but without resorting to following EU law or supervision cemented in treaty provisions. It "will not agree to measures in these areas which go beyond those typically included in a comprehensive free trade agreement." The written statement continues: 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.²²

The statement echoes earlier remarks by Boris Johnson and his Government ministers in rejecting commitments on level playing field and regulatory alignment.

David Frost, the UK's chief Brexit negotiator confirmed in his [speech in Brussels](#) on 17 February that not accepting EU supervision on 'so-called level playing field issues' is fundamental to the Government's position:

It is central to our vision that we must have the ability to set laws that suit us – to claim the right that every other non-EU country in the world has. So to think that we might accept EU supervision on

²⁰ Prime Minister's [letter](#) to Jean-Claude Juncker, 2 October 2019; "[EU warns Johnson plan on rules divergence will hinder trade talks](#)", *Financial Times*, 5 September 2019.

²¹ The Government referred to "independent policies in areas such as (but not limited to) the points-based immigration system, competition and subsidies, the environment, social policy, procurement and data protection.

²² [UK / EU relations: Written statement](#), HCWS86, 3 February 2020

so-called level playing field issues simply fails to see the point of what we are doing.

This position is in contrast to Theresa May's Government which proposed "reciprocal commitments that would ensure UK businesses could carry on competing fairly in EU markets". These included a common rulebook for state aid and non-regression provisions in areas like environment and employment rules.²³

The Government's command paper of 27 February 2020 provides more detail on its approach. It does not use the term level playing field although it proposes chapters in the future free trade agreement covering environmental and labour standards with reciprocal commitments not to weaken protections, subsidies (reciprocal commitments to transparency), competition policy (commitments to main effective competition laws) and tax policy (commitments to good tax governance). In these chapters, it stipulates that in line with precedents in EU FTAs such as CETA, the provisions **should not be subject to the agreement's dispute resolution mechanism** (part 1, chapters 20-22, 26-28). The Government proposes that climate change be covered by a separate agreement on energy co-operation with separate "appropriate" governance arrangements (part 2, paragraphs 9-16).

1.5 EU objectives for negotiations

In the run-up to the future relationship negotiations, various EU and Member State officials reiterated that if the UK does not agree to commitments on level playing field, then the EU will not offer a zero tariff and zero quota free trade agreement.²⁴ The EU's chief negotiator Michel Barnier warned that "the UK should not think that zero tariffs, zero quotas will be enough. The EU will insist on zero tariffs, zero quotas and zero dumping".²⁵ By "dumping", the EU is referring to products on the market produced through what it views as "unfair" competition.

EU Commission President Von der Leyen [stated in January 2020](#):

But the truth is that our partnership cannot and will not be the same as before. And it cannot and will not be as close as before – because with every choice comes a consequence. With every decision comes a trade-off. Without the free movement of people, you cannot have the free movement of capital, goods and services. Without a level playing field on environment, labour,

²³ HM Government, [The future relationship between the United Kingdom and the European Union](#), Cm 9593, p9

²⁴ EU's chief negotiator [Barnier said on 3 February](#) that a level playing field had to be a condition for a "zero-tariffs, zero-quota" deal."; ["France demands UK aligns with EU rules forever in return for Brexit trade deal"](#), *The Telegraph*, 7 February 2020

²⁵ ["EU's Barnier warns of tough times ahead on UK trade deal"](#), Associated Press, 5 November 2019

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taxation and state aid, you cannot have the highest quality access to the world's largest single market.²⁶

In the EU's view, [geographic proximity, the value of trade](#) and economic interconnectedness are such that asking for "commensurately strong LPF guarantees" in return for access to its Single Market is only fair.²⁷

The draft negotiating directives published by the European Commission on 3 February set out a need for "effective **management and supervision, dispute settlement and enforcement arrangements, including appropriate remedies**" to guarantee the implementation of commitments. The EU would also be able to take autonomous steps quickly and retaliate in reaction to any disruption of competition.²⁸

The text elaborates on the scope of commitments, also including provisions relating to state-owned enterprises and climate change.²⁹ There are also related requirements to uphold international rules and principles on sustainability related to environment, social rights and climate change, as promoted by the United Nations, the International Labour Organisation, and other international organisations.

In addition to general requirements on level playing field, the text proposes sector-specific provisions for aviation and road transport (e.g., non-regression from social rules for road operators and drivers), energy and the carbon emission trading system.

Dynamic alignment vs non-regression

Following the publication of the Commission's draft negotiating directives, there were reports that several Member States wanted the level playing field requirements to be strengthened and that the French Government wanted dynamic alignment (requiring the UK to keep up with changes in EU rules) in all areas.³⁰

On 12 February 2020, the European Parliament, which would have a binding say over any trade deal, in a [resolution](#) on the proposed negotiating mandate requested guarantees to a level playing field "with a view to dynamic alignment" across a range of issues. The Parliament's

²⁶ Speech by European Commission President von der Leyen at the London School of Economics on "[Old friends, new beginnings: building another future for the EU-UK partnership](#)", 8 January 2020

²⁷ European Commission, [Q&A on the draft negotiating directives for a new partnership with the UK](#), 3 February 2020; European Parliament [Resolution](#) of 12 February 2020 underlines that a deeper relationship will require a robust framework for competition and state aid, "in order to ensure that the UK does not engage in unfair and anti-competitive behaviour leading to the undercutting of EU economic actors".

²⁸ Draft Directives, para 89

²⁹ Draft Directives, para 89

³⁰ "[France demands UK aligns with EU rules forever in return for Brexit trade deal: Paris wants Britain to commit to changing its laws to mirror the EU's rules as they evolve over time as part of new trade agreement](#)", *The Telegraph*, 7 February 2020; See "[Fishing and finance among France's sticking points for a trade deal between the EU and Britain](#)", *inews*, 18 February 2020

position could potentially [strengthen the EU negotiators'](#) hand towards the UK.³¹

The [negotiating directives](#) were formally adopted by the General Affairs Council on 25 February, with strengthened language on the level playing field.³² A reference was added in relation to the general approach to the level playing field, asking both the UK and EU to uphold "corresponding high standards over time with Union standards as a reference point". This reflects a desire on the part of the EU to find ways to evolve the agreed commitments over time or extend their scope to new areas. The House of Lords EU Committee report on the EU negotiating directives notes that including the phrase "Union standards as a reference point" denotes hardening of the EU's position in the weeks before the text was finalised. The Political Declaration had no reference to continuing UK alignment with EU rules.³³

The final text remained unchanged from the Commission draft in calling for a continued application of existing EU rules (dynamic alignment) on state aid (paragraph 96). The EU would expect non-regression on aspects of tax, labour and the environment (paragraphs 99, 101, 103), meaning that the level of protection in those areas should not be reduced from common standards applicable within the EU and UK at the end of the transition period. In addition, the EU proposes giving the governing body powers to modify the commitments to reflect evolving standards. This denotes a hardening position over the weeks before adopting the mandate.

The reference to upholding "corresponding high standards over time with Union standards as a reference point" has led some to suggest that the EU is calling for some form of dynamic alignment or seeking "[parallel evolution](#)" of standards. Giving evidence to the House of Lords EU Internal Market Sub-Committee, Dr Lorand Bartels agreed that the text could be interpreted as meaning dynamic alignment but that it could also mean something more modest:

I agree, but the ambiguity in the additional sentence that I referred to could, as I said before, cover dynamic alignment, which is what you are referring to, but not necessarily, because it could also be more modest and end up being a clause which one sees quite commonly in FTAs; it is even elsewhere in the mandate. It says that the parties shall strive to ensure the achievement of high standards, and so on. That is a much softer obligation than dynamic alignment.³⁴

Georgina Wright of the Institute for Government has suggested that the UK would not be expected to adopt the same standards but to use [EU](#)

³¹ "[UK alignment on EU standards price to pay for trade deal, say MEPs](#)", *The Guardian*, 12 February 2020; "[Brexit: EU Parliament makes tough demands for talks](#)", *BBC*, 12 February 2020

³² Council of the EU, [Directives for the negotiation of a new partnership with the United Kingdom of Great Britain and Northern Ireland](#), 5870/20, 25 February 2020

³³ House of Lords European Union Committee, [Report pursuant to section 29 of the European Union \(Withdrawal Agreement\) Act 2020: Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#), HL 32, 5 March 2020, para 107

³⁴ House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q3

[rules and standards as benchmarks](#) for adjusting its own rules in the long term.

Box 1: A summary of EU level playing field requirements

In its negotiating directives, the EU is seeking level playing field commitments in the future EU-UK trade agreement underpinning trade in goods and services in the areas detailed below:

State aid and competition

The EU is proposing to apply EU state aid rules to and in the UK. An independent UK enforcement authority would work in close cooperation with the Commission. There would be a prohibition on anti-competitive conduct and concentration of firms.

State owned enterprises

The treaty would include provisions on state-owned enterprises, designated monopolies and enterprises with special rights to prevent distortion of competition or barriers to trade and investment by these entities.

Taxation

The EU is proposing that both sides sign up to the principles of good governance in matters of taxation (e.g. regarding transparency and fair taxation) and curbing harmful tax measures in line with internationally recognised policy frameworks, such as G20 and OECD guidance.

There would be non-regression clauses in areas such as exchange of information on income, tax and beneficial ownership, and anti-tax avoidance practices.

Labour and social protection

The treaty would contain non-regression clauses with regard to fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level and other areas. Both the UK and EU would promote social dialogue in labour matters.

Environment and health

The EU is proposing non-regression clauses in a number of areas of regulations, including access to environmental information, environmental impact assessment, industrial emissions, air quality, nature conservation, waste management and climate change. The final version of the directives also includes non-regression on standards related to health and product sanitary quality in the agricultural and food sector. In addition, the directives propose adherence to the precautionary principle, 'the polluter pays' principle and other principles at heart of EU environmental law.

Climate change

Both the EU and UK would reaffirm commitments to international agreements, such as the Paris Agreement.

The UK would have a system of carbon pricing equivalent to the EU system and consider linking its greenhouse gas emission trading system (ETS) with the EU ETS, subject to conditions agreed with the EU and level playing field commitments.

Relating to areas not covered by a system of carbon pricing, the parties would agree not to regress below EU standards and targets agreed between parties by the end of the transition.

A general so-called '[ratchet clause](#)' stipulates that if either the EU or the UK go beyond the agreed level of environmental, social, labour, and climate protection, these protections are locked in and cannot be lowered again in order to boost trade and investment.

The text emphasises for each of these areas the need to establish "adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement..."

The final text also expanded the scope of the proposed level playing field on environmental protection to include "health and product sanitary quality in the agricultural and food sector", with the section heading becoming "environment and health". This was [reportedly](#) included on the recommendation of France, reflecting concern that if the UK were not to maintain a ban on certain types of food production, it might lead to substandard products entering the EU market, for example, as a result of a US-UK trade deal. This would include a ban on

[methods such as endocrine disruptors, selected pesticides and chlorine washes for poultry](#).³⁵

Draft EU treaty text

On 12 March 2020, the European Commission circulated a draft text of the Agreement on the New Partnership between the European Union and the United Kingdom.³⁶ In line with the EU's negotiating directives, this would require the UK to comply with EU state aid law including future amendments. UK courts would be able to refer questions of interpretation of EU state aid law to the CJEU. A joint EU-UK committee on the level playing field would need to come to an agreement on whether new EU state aid provisions would be adopted by the UK, but the EU could take "interim measures" if the UK does not agree on the adoption of new provisions. The text also includes non-regression provisions for labour law, environmental standards and climate change measures, and ratchet clauses whereby if both parties increase the level of protection one cannot reduce it again.

The draft treaty also proposes dispute resolution mechanisms which will apply for the level playing field sectors, but with some exceptions. The mechanism would involve consultations in the joint committee, recourse to an arbitration panel, issuing of fines by the panel and suspension of parts of the agreement by the other party in the case of non-compliance.

The dispute resolution mechanism would not apply to most aspects of the competition provisions (except for a provision on enforcement of domestic law on competition), good governance standards in taxation (although maintenance of anti-tax avoidance measures is covered by the dispute resolution mechanism), and the climate change section where a panel of experts would be called upon to resolve a dispute.

1.6 Is an agreement possible?

As the negotiations on the future relationship began, the UK and EU approaches to level playing field commitments differed significantly. While in the Political Declaration both signed up to negotiating level playing field commitments "commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties", the interpretation of 'commensurate' or corresponding level of standards diverged.

The UK government emphasises its sovereign right to full regulatory autonomy. It has reiterated having no intention to lower standards in various areas such as labour rights and environmental protection. At the same time, the UK does not want any commitments to follow or apply EU law, or to institutional supervision or dispute resolution. It does not

³⁵ [EU to demand UK keep chlorinated chicken ban in order to get post-Brexit trade deal](#), PoliticsHome, 25 February 2020; [Barnier pours scorn on Johnson's spokesman ahead of trade talks](#), *The Guardian*, 25 February 2020

³⁶ European Commission, [Draft text of the Agreement on the New Partnership between the European Union and the United Kingdom](#), UKTF (2020) 14, 12 March 2020. See also [twitter thread](#) by Professor Steve Peers on the draft text.

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support commitments which would go beyond what is common in typical free trade agreements being written into the UK-EU agreement. [Its position seems to invite](#) trust in its political pledge that it will not undercut.

The EU is seeking legally binding commitments, with EU standards as a guidance, subject to strong enforcement mechanisms domestically and in the treaty framework. It wants disagreements around these standards to be subject to the agreement's dispute resolution mechanism and might see this as an insurance policy. It views the examples of other EU FTA commitments, which tend to be weak on enforcement, as insufficient for its partnership with the UK.

Any plans to diverge?

Comparing UK and EU negotiating positions, an agreement on the substance of corresponding standards seems plausible in many areas of level playing field. The [House of Lords EU Committee analysis](#) of the Government's command paper and the EU Council negotiating directives suggests that there may be some room for manoeuvre between the two parties' positions:

119. ... The [EU] Council Decision adds considerably more detail, and while it calls for non-regression in several areas, it demands continuing alignment with EU rules only in respect of State aid.

120. The Government's acceptance that the two sides should make "reciprocal commitments" to maintaining high standards in competition policy, the environment, labour standards and taxation, leaves open the possibility that the two sides could reach agreement in these areas. But the UK and EU positions on State aid are essentially incompatible, and have recently hardened.³⁷

As noted above in section 1.1, the Government has said that its policy is not to lower labour, social and environmental standards or change regulations "[for the sake of divergence](#)".³⁸ In addition, the UK has recently introduced laws and policies in some areas which would facilitate agreement with the EU on "corresponding" standards.

It may be less hard to find an agreement on matters of taxation and limiting anti-competitive behaviours of businesses given there is no indication of disagreement on these principles. For example, there is little evidence of any UK proposals to diverge from the fundamental, globally recognised principles of competition law which are embedded in EU law.

The UK government has introduced a new [Environment Bill 2019-20](#). It would establish a set of environmental principles in domestic law and set up an Office for Environmental Protection to enforce environmental law. On climate change, the UK and EU propose different forms of an agreement, with the UK seeking a separate energy agreement and the

³⁷ House of Lords European Union Committee, [Report pursuant to section 29 of the European Union \(Withdrawal Agreement\) Act 2020: Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for a new partnership agreement](#), HL 32, 5 March 2020, paras 119-120

³⁸ [HC Deb 19 October 2019](#) vol. 666 c602; "[Sajid Javid seeks to placate business over post-Brexit rules](#)", *Financial Times*, 23 January 2020

EU including climate change proposals within the general framework of the free trade agreement. Linking a UK Emission Trading Scheme (ETS) with the EU ETS is an option considered by both parties, albeit with different conditions from each party (see chapters 7 and 8).

At the moment, significant aspects of UK labour standards are underpinned by a detailed common framework with the EU, and the government has said it is not seeking divergence. At the same time, there have been reports of an intent to diverge from existing labour standards (see section 6.3).

In contrast to other areas, it will be more difficult to find common ground on state aid, a priority for the EU. In this area, wary of possible subsidies to UK businesses and industry, it demands continued application of EU rules in the UK. The UK is proposing to maintain broad commitments on transparency, without any alignment to EU rules.

Here it is worth noting that the Government has made a number of commitments under the Withdrawal Agreement (the Protocol on Ireland/ Northern Ireland), which could in reality make a radical departure from EU state aid rules more difficult. The Protocol states that EU state aid law shall apply to the UK "in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol." These provisions can potentially reach further than Northern Ireland and may also include all-UK support measures for businesses, such as tax breaks.³⁹ Because of this constraint, designing a completely different UK regime for subsidy controls might be inefficient. See section 2.1.

In the Institute for Public Policy Research (IPPR) briefing [Negotiating the level playing field](#), Marley Morris, the Associate Director of Immigration, Trade and EU Relations, has identified potential areas of compromise. This would involve agreement to uphold broader international standards, agreement to non-regression in certain areas (e.g. environment and labour) in terms of maintaining a certain level or protection through equivalent (but possibly different) means, and possibly some dynamic alignment. He emphasises that this will depend upon agreement on enforcement and dispute resolution:

[...] 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...⁴⁰

³⁹ Matthew Holehouse, "State aid, competition, environmental obligations feature in UK's revised exit package", *MLex*, 18 October 2019

⁴⁰ Marley Morris, [Negotiating the level playing field](#), IPPR, 5 March 2020, p15

Alex Stojanovic of the Institute for Government has suggested that to succeed, the UK would need to explain why it wants to diverge from EU rules and provide an assurance that its aim is not to undercut the EU market. It would need to demonstrate that it can be relied upon to enforce rules domestically, and provide examples of different, beneficial approaches to regulation:

The UK is unlikely to suddenly attempt a race to the bottom after Brexit. But there is a risk that talking up the freedoms of Brexit at home will simply encourage the EU to adopt a more hard-line negotiating stance. The government needs to make clear that the regulatory freedom it wants after Brexit will not pose a threat to the EU [...]⁴¹

In evidence to HL Internal Market sub-committee inquiry on level playing field and state aid, several witnesses emphasised the need to focus on the UK's interests in these negotiations, as certain obligations would be part of any deal. Dr Holger Hestermeyer, Reader in International Dispute Resolution at Kings College London, suggested:

In those complicated debates the solution would be to de-escalate and to see the level playing field not as the black and white discussion that we have in public but as the rather more complex structure of obligations that will ultimately be in any deal, and to start thinking about what the UK wants from a level playing field and perhaps where we see our interests and what we would want protected in a level playing field and use that in the negotiation as well.⁴²

Negotiating with the US in parallel?

On 2 March, the UK government published [a document outlining its objectives in trade negotiations with the US](#) in preparation for opening parallel negotiations with the US soon.⁴³ Shanker Singham, trade fellow of the Institute of Economic Affairs has [suggested](#) that if the talks with the USA were to progress quickly, it could put pressure on the EU to relax some of its stark demands to the UK, especially on the level playing field.⁴⁴

The Government document (p9) states that one of the UK objectives for an FTA with the US is to ensure high standards and protections for UK consumers and workers and build on its existing international obligations. This would include the UK "not compromising on [its] high environmental protection, animal welfare and food standards." According to media reports, the EU's chief negotiator Michel Barnier said that he was "quite surprised" to read this document "setting out

⁴¹ Alex Stojanovic, "[A bumpy level playing field awaits the next round of Brexit talks](#)", *Institute for Government*, 16 January 2020

⁴² House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Qq 6,8

⁴³ Department for International Trade, UK-US Free Trade [Agreement](#), 2 March 2020

⁴⁴ "Negotiating deals with both the EU and US will be tricky for Britain-but it does have a trump card", *The Telegraph*, 5 March 2020

[British demands for a level playing field](#)” to the USA while the UK was reluctant to make commitments on level playing field to the EU.⁴⁵

⁴⁵ [“Barnier warns of grave differences between EU and UK in trade talks”](#), *The Guardian*, 5 March 2020; see also “Britain’s Brexit negotiator goes to work on an egg as first round of talks takes place in Brussels”, *The Telegraph*, 2 March 2020

2. State aid

2.1 Background: EU state aid framework in the UK

As an EU Member State, the UK has been part of the EU regime for state aid. The UK didn't need its own state aid rules because EU law in this area applies directly in all Member States.

The EU state aid regime is specifically aimed at creating a level playing field for businesses in the Single Market. Under Article 107 TFEU, state aid is prohibited, if it threatens to distort competition and trade between Member States. State aid refers to national public authorities offering grants, tax reliefs and various other forms of support, which favour specific businesses or industries. The threshold for an aid instrument to be typed as "distorting competition and trade" is generally low and many public support schemes in areas as business innovation, support to local businesses or schemes to boost the use of renewable energy are subject to EU state aid controls.

Member States are required to notify the European Commission before paying out any aid. The Commission can authorise aid which helps achieve defined policy goals such as regional economic development or better environmental protection.

In practice, since 2015 more than 90% of new public support measures have been covered by exemption regulations which do not require a notification, but ex post controls take place.⁴⁶

Successive UK governments have supported rigorous state aid controls and restrictive policies across the EU.⁴⁷ In 2017 the UK spent 0.38 per cent of GDP on state aid, which was around half of the EU average of 0.76 per cent.⁴⁸

The EU has indicated that the enforcement of state aid rules is one of its main concerns among the level playing field obligations. This will be a critical area in the negotiations.

Proposals in earlier stages of negotiations

October 2018 Withdrawal Agreement and the Protocol on Ireland/Northern Ireland

State aid was part of the level playing field commitments in the [Protocol on Ireland/Northern Ireland](#) (the "Backstop") agreed by Theresa May's Government in November 2018. Under the Protocol's provisions, the UK as a whole would stay "dynamically aligned", i.e. would continue to apply evolving EU state aid rules.

⁴⁶ European Commission, [State aid scoreboard 2018 website](#) (accessed on 15 March 2020)

⁴⁷ [EU State Aid Rules and WTO Subsidies Agreement](#), Commons Library Briefing Paper CBP-06775, 12 June 2019, p14

⁴⁸ European Commission, [State aid scoreboard 2018 website](#)

The European Commission would enforce those rules in Northern Ireland. An independent UK state aid authority, thought to be the Competition and Markets Authority (CMA), would have broad powers to ensure compliance in the rest of the UK. The Protocol also contained extensive consultation arrangements between the Commission and the UK state aid authority. In addition, the Commission would have standing before UK courts in state aid cases – a feature described by the Institute for Government as “not a usual [one] in international agreements”. The CJEU would retain its jurisdiction over the interpretation of EU state aid law. See Commons Briefing CBP-8453, [The UK's EU Withdrawal Agreement](#), section 8.7 for a detailed description.

There were indications that for state aid, the Northern Ireland Backstop model would act as a “starting point” for negotiations on the future relationship. This was [reportedly](#) confirmed by the EU’s deputy chief Brexit negotiator Sabine Weyand in November 2018.

This proposal was abandoned in the 2019 version of the Protocol. However, the EU negotiating position on state aid described in section 2.3 below - including dynamic alignment with EU rules, close cooperation on enforcement between the Commission and the UK authority, and a role of the Court of Justice of the EU (CJEU) in interpreting the EU law - in many aspects follows the model proposed under the “Backstop”. State aid lawyer George Peretz commented before the House of Lords EU Internal Market Sub-Committee:

That is a model that a previous UK Government agreed, and it may be the sort of thing the EU has in mind. You may detect from my note of scepticism that I am not entirely certain that that model would ever have been sustainable if the Theresa May arrangement had gone through. There are problems with the CMA having, to put it bluntly, power to strike down an Act of Parliament. I am not sure that would have worked.⁴⁹

November 2019 Protocol on Ireland/ Northern Ireland

The revised Protocol on Ireland / Northern Ireland no longer contains a reference to level playing field obligations. Nevertheless, EU State Aid provisions will continue to apply in Northern Ireland and potentially further.

Article 10 of the Protocol states that EU state aid law shall apply to the United Kingdom “in respect of measures which affect that trade between Northern Ireland and the Union which is subject to this Protocol.” Through Article 10, the European Commission retains powers to enforce state aid rules, but with respect to Northern Ireland-EU trade. The Commission will keep the UK “fully and regularly informed” of the progress and outcomes of its assessment procedures. Any matters related to interpreting EU state aid law would be referred to the CJEU.

⁴⁹ House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 5 March 2020 Q12; See also V Verouden, P Ibáñez-Colomo, “[Ensuring a level playing field post-Brexit: State aid control](#)”, *SSRN*, 11 January 2019, p23-24

It is not immediately clear how broadly the state aid provisions will work in practice, and how far measures that affect trade between Northern Ireland and the EU may also cover UK support to businesses in Great Britain that sell goods in Northern Ireland.⁵⁰

For further information see Commons Briefing CBP-8713 [The October 2019 EU UK Withdrawal Agreement](#), 18 October 2019.

Future UK policy on state subsidies

Theresa May's Government was planning an independent UK regime for state aid which would replicate the existing EU regime after leaving the EU. [UK state aid regulations](#) would incorporate EU rules into UK law as they were on exit day. However, the [draft legislation](#) to do this was withdrawn in February 2020.

Boris Johnson's Government has taken a different position towards future alignment with EU state aid rules. Mr Johnson said during the general election campaign that his Government intended to [introduce a new state aid regime](#) to make it faster and easier for the Government "to protect jobs when an industry is in trouble ...". The Prime Minister said:

If returned with a majority, a Boris Johnson government will take immediate steps to ensure that a new state aid regime is designed and ready to be in place by 1 January 2021. This will be a whole new approach, based on the World Trade Organisation commitments on restricting harmful subsidies. As the UK will be leaving the EU's single market, the state aid system that we introduce will be different to the EU's system.⁵¹

In his [Greenwich speech on 3 February 2020](#), referring to the term 'subsidies' instead of 'state aid', Mr Johnson said that the UK would restore full sovereign control over its subsidy rules. The Government also ruled out any jurisdiction for the CJEU over the UK's laws.⁵²

The WTO commitments in Prime Minister's speech refer to an [anti-subsidy regime based on the WTO Agreement on Subsidies and Countervailing Measures \(ASCM\) rules](#) (see box 2 below). The Government hasn't announced any further details of the new model. State aid lawyer James Webber has set out in his article [UK state aid after Brexit](#) how a regime based on the ASCM might work.⁵³

Any Government plans for a new policy framework would have to take into account the state aid obligations under the [Protocol on Ireland/Northern Ireland](#). State aid [experts](#) and commentators have [noted](#) that by signing up to the Protocol, the UK has already agreed to a system which could in practice extend the reach of EU state aid enforcement

⁵⁰ Matthew Holehouse, "State aid, competition, environmental obligations feature in UK's revised exit package", *MLex*, 18 October 2019

⁵¹ "[Johnson makes pitch to Labour leavers with plans for more state aid and 'buy British' policies after Brexit](#)", *The Guardian*, 28 November 2019

⁵² [UK / EU relations: Written statement](#), HCWS86, 3 February 2020

⁵³ J. Webber, "[All Change? UK State Aid after Brexit What Law? Whose Courts? Politeia](#)", February 2020

[further than just Northern Ireland](#).⁵⁴ For example, a UK-wide tax measure, benefitting a NI business might be caught by the system as it could potentially affect trade between NI and the EU. Such considerations would make it quite difficult to operate two radically different state aid regimes – one based on EU rules in Northern Ireland and an ASCM-based regime in the rest of the UK.

On Northern Ireland, a [UK government spokesperson said to the Financial Times](#) on 9 February that while developing a “modern system for supporting UK businesses in a way which fulfils our interests ... [w]e will take into account the unique circumstances in Northern Ireland as this policy is developed and implemented.”

Box 2: WTO Agreement on Subsidies and Countervailing Measures (ASCM)

The WTO rules on state aid are laid out in the Agreement on Subsidies and Countervailing Measures (SCM). This agreement frames the use of subsidies and the actions countries can take to protect themselves from the effects of another country’s subsidies.

To count as a subsidy under this Agreement, a subsidy must be ‘specific’, that is, it must be targeted at certain enterprises or industries. Furthermore, a subsidy must be made up of three elements:

- A financial contribution
- by a government or any public body within the territory of a member
- which confers a benefit.

All three elements must apply for a subsidy to exist. If an instance of state support does not meet this definition or if it is not ‘specific’, a complaining country does not have recourse to the provisions of the Agreement.

There are a number of differences that make EU rules a lot more stringent than those of the WTO.

- First, the default position in WTO rules is that subsidies not targeted at exports and/or import substitution are allowed, unless another country can demonstrate that these subsidies cause *an injury* to a domestic industry or trade in general. The threshold for this is generally high; EU rules, on the other hand, consider subsidies to be generally illegal, unless the subsidiser can demonstrate that the subsidies fall within an approved scheme or exemption.
- Second, EU rules also apply domestically. State aid rules can make a domestic subsidy illegal even if that subsidy has not actually affected international trade – there is only a requirement that the aid measure potentially has an effect on trade. WTO rules, on the other hand, require another country to demonstrate that its domestic industry is hurt.
- Third, EU rules are applied prospectively and do not need an official complaint from a member state to be triggered. Moreover, businesses can trigger a state aid investigation by a complaint or go to court if they find that public support to a competitor is damaging their own competitive position. The implementation of the WTO rules relies on ex post dispute settlements without any retrospective recovery of unlawful aid. These rules are much less specific than the EU state aid law and seem to give far greater freedom to its members to provide various types of aid.

2.2 UK negotiating position

As set out in its [statement of 3 February 2020 on UK/EU relationships](#), the Government does not believe that to secure a comprehensive agreement, it is necessary to be bound by an international treaty or guided by shared institutions in competition and subsidies policy as such commitments could hamper its aspirations to develop “separate and independent policies” on state aid.

⁵⁴ [“Comment: Brexit deal’s state aid rules might have long reach”](#), *MLex*, 19 October 2019; [“EU powers to review UK state aid under Irish Border Protocol to be assessed ‘case by case’”](#), *MLex*, 24 January 2020; G.Peretz QC in [“Boris Johnson’s efforts to escape EU state aid rules ‘mistaken’”](#), *Financial Times*, 9 February 2020

The statement of 3 February reiterated that, like in other areas of level playing field, regarding state aid, the UK will not agree to measures “which go beyond those typically included in a comprehensive free trade agreement.”

The Government’s command paper [The future relationship with the EU. The UK’s approach to negotiations](#) of 27 February states (Chapter 20):

64. The UK will have its own regime of subsidy control. The Agreement should include reciprocal commitments to transparency about the award of subsidies which go beyond the notification requirements set out in the WTO Agreement on Subsidies and Countervailing Measures. This should include an obligation on both parties to notify the other every two years on any subsidy granted within its territory, applying to goods or services, in line with EU-Japan EPA. The Agreement should also include the right to request consultations on any subsidy that might be considered to harm the interests of the parties.

In addition, it states that provisions on subsidies should not be subject to the Agreement's dispute resolution mechanism (Article 65).

The UK Government’s command paper of 27 February notes that the UK is willing to accept reciprocal commitments on transparency, which go beyond the notification requirements of the WTO ASCM, as they were included in the [EU-Japan Economic Partnership Agreement](#). While the ASCM covers only trade in goods, the Government is willing to extend its commitments to cover trade in services too. This is a concession to the EU position. EU state aid rules cover all trade and do not distinguish between goods, services or movements of capital.

2.3 EU negotiating position

Following the approach set out in the Political Declaration, the [Council negotiating directives](#) require upholding “common high standards” but add a request for “corresponding high standards over time with Union standards as a reference point” in the area of state aid. Paragraph 96 of the directives envisages the UK to agree to EU state aid rules applying “to and in the UK.” An independent UK enforcement authority would enforce UK aid measures capable of affecting UK-EU trade. This authority would operate in close cooperation with the European Commission:

96. The envisaged partnership should ensure the application of Union State aid rules to and in the United Kingdom. For aid granted by the United Kingdom affecting trade between Great Britain and the Union, the United Kingdom should set up an independent and adequately resourced enforcement authority with effective powers to enforce the applicable rules, which should work in close cooperation with the Commission. Disputes about the application of State aid rules in the United Kingdom should be subject to dispute settlement.

Disputes on the application of state aid rules in the UK would be subject to dispute settlement (Article 96). An [IPPR briefing](#) on level playing field describes the proposed mechanism:

In order to administer the agreement, the EU is likely to propose that disputes on state aid between the two sides should first be

dealt with through consultations, and then if necessary be escalated to a formal arbitration panel. This could result in the offending party facing sanctions – such as financial penalties or restrictions in market access. In addition, any questions relating to the interpretation of EU law would have to be decided by the Court of Justice of the European Union.

The EU proposal to base the UK state aid regime on EU law [would require a role for the CJEU](#), which has an exclusive competence to interpret EU law. As the UK Government is ruling out “any jurisdiction for the CJEU over the UK’s laws”, or “any supranational control in any area”⁵⁵ and considering a [subsidy regime based on WTO rules](#), reaching an agreement on state aid rules would be difficult.

2.4 State aid and subsidy controls in EU FTAs

Trade agreements between the EU and third countries include varying degrees of controls on state aid. Generally, the closer the market integration, the more state aid or anti-subsidy rules form part of the agreement.⁵⁶

One can distinguish between ‘parallel systems’ substantially equivalent to EU state aid regulation and ‘WTO-plus’ systems.⁵⁷ Examples of parallel application are the [European Economic Area](#) (EEA) agreement and EU trade agreements with countries like Ukraine which aspire to become EU Member States. The WTO-plus approach of building on the provisions of the WTO ASCM is found in the EU FTAs with Canada and Japan. The UK Government’s command paper of 27 February refers to these two agreements as models for UK-EU commitments on subsidies.

EU-Ukraine Association agreement

The Ukraine-EU Association Agreement is a model for the type of parallel state aid system and appears close to the model the EU is seeking to embed in its future relationship with the UK. Under the Association Agreement, Ukraine has its own state aid regime and an independent enforcement authority, but it applies all EU state aid rules in full. Both parties report to each other annually on the state aid each has granted.⁵⁸ The CJEU is involved in interpreting EU rules on state aid.

CETA

The Government’s command paper of 27 February refers to [CETA](#) between the EU and Canada as one of the templates for future commitments regarding state aid. CETA does not contain any state aid provisions as such and would fall within the WTO-plus category. Instead, it reaffirms the trade partners’ rights and obligations under the WTO ASCM for goods, with a voluntary extension for services (Chapter 3).⁵⁹

⁵⁵ [UK / EU relations: Written statement](#), HCWS86, 3 February 2020

⁵⁶ Morris Schonberg, “[Continuity or change? State aid control in a post-Brexit United Kingdom](#)”, *Competition Law Journal* 47, 2017, p54

⁵⁷ House of Lords EU Committee, Internal Market Sub-Committee, [Brexit: competition and State aid](#), 2 February 2018, HL 67 2017-19, [Ev CMP0029](#)

⁵⁸ House of Lords EU Committee, Internal Market Sub-Committee, [Brexit: competition and State aid](#), 2 February 2018, HL 67 2017-19, para 178

⁵⁹ European Commission, [CETA chapter by chapter](#), December 2016

Beyond WTO rules, CETA introduces the obligation to be transparent about subsidies to producers of goods, and to service providers. In addition, there is a consultation mechanism for the parties to discuss subsidies that may negatively affect their trade (Chapter 7).

EU-Japan Economic Partnership Agreement

[EU-Japan Economic Partnership Agreement](#) is another example of the WTO-plus model built on the WTO ASCM. Similarly to CETA, this agreement contains commitments on transparency and requests parties to notify each other biannually of their government subsidies. EU-Japan agreement requires imposing limits on government-backed guarantees which are offered to cover the debts of businesses. Aid to insolvent businesses has to be based on a credible restructuring plan.

Parties can request a consultation if a subsidy is considered having a significant negative impact on their trade and investment interests. Commitments on state subsidies are carved out from the agreement's dispute settlement mechanism (Chapter 12).⁶⁰

2.5 Scope for agreement

Given the EU's principled position on state aid, in order to find a middle ground, the UK Government would have to demonstrate that its regime offers [equivalent protection](#) to the EU state aid regime. *Financial Times* economics editor Chris Giles has suggested that this possibly could be accompanied with the EU being able to [invoke trade sanctions](#) if the agreement is breached:

To avoid what could become an impasse, an obvious compromise would be for the UK to reject having to follow EU rules automatically but Brussels then being able to apply immediate trade sanctions if Britain followed another path.

Dr Holger Hestermeyer stressed in his [evidence before the House of Lords EU Internal Market subcommittee on 27 February 2020](#) that it would be in the UK's interests to have mechanisms like sanctions in case EU Member States failed to enforce their state aid commitments. The UK could also use an agreement with the EU to forge a new model which would help its global efforts to combat anti-competitive government subsidies in third countries:

Dr Holger Hestermeyer: The obligation to enforce your own laws becomes relevant then, and if the EU does not enforce its own laws it would be the UK that could use sanctioning mechanisms, if those were in the agreement. This cuts both ways. The debate is too focused on the idea of sovereignty, without a concrete idea of how to deregulate, rather than what we want. On subsidies, for example, this is a great opportunity for the UK to build a model that perhaps can also help in the WTO field. With a partner that wants stronger rules, why not use the opportunity to build that rather than say that we do not want to be bound, we

⁶⁰ Study for the European Parliament, [The EU – Japan Economic Partnership Agreement](#), 2018, PE 603.880, pp21-22

want to subsidise, which, historically at least, we do not really do that much.⁶¹

The Government is indeed considering its role in promoting new global anti-subsidy standards. This appears from a statement made by the Minister for International Trade Liz Truss [at the WTO on 3 March, where she said](#): “We will make the case to update the WTO rulebook to tackle underlying trade tensions such as industrial subsidies...”

“Non market-oriented policies and practices” of third countries which subsidise their industries is a global concern and initiatives for new rules on industrial subsidies are [supported by parties like the United States, Japan and the EU](#).

Trade expert David Henig points out that the UK’s statement at the WTO contrasts with the its position to see any EU attempt to constrain UK state aid policy as “outrageous”.⁶²

⁶¹ House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q6

⁶² [“Truss urges WTO to crack down on unfair trade practices”](#), *Reuters*, 3 March 2020

3. Competition

3.1 Background to the negotiations

Obligations with regard to competition policy are central to the level playing field. They are also common in free trade agreements.

Proposals in earlier stages of negotiations

The Protocol on Northern Ireland/Ireland in the November 2018 version of the Withdrawal Agreement included the following references to future arrangements for competition and anti-competitive business practices:

- Annex 4, Part 5, Competition, committed both the UK and EU to continuing to take action against anti-competitive business practices such as cartel agreements (Article 17), the abuse of a dominant position (Article 18), and mergers and takeovers which threaten to substantially reduce competition (Article 19).
- Under Article 23 of Annex 4, Part 5, the EU and UK also committed to continued cooperation in matters of policy and enforcement between their respective competition authorities. The authorities are the Competition and Markets Authority (CMA) in the UK and the European Commission (EC) in the EU.

These commitments were not included in the October 2019 Withdrawal Agreement but referred to in the Political Declaration as described in section 1.3 above. There is, however, a global consensus that the three practices – cartel arrangements, the abuse of dominance and anti-competitive mergers – are harmful. In a speech about competition after Brexit, Michael Grenfell, Executive Director of Enforcement of the Competition and Markets Authority (CMA), explained that the fundamental principles of competition law are the same around the world:

Certainly, there are advantages in businesses being subject to competition laws that do not differ too radically from each other, particularly in the case of businesses that operate multi-nationally. But that is in any way the case – in most respects, competition law imposes the same requirements on businesses across the globe. Whether under the UK or the EU regime, the US or the Australian, the Russian or the South African, it's unlawful for businesses to collude on price, for example, or to engage in bid-rigging when tendering for contracts.⁶³

In general terms, the CMA had been planning to remain aligned with EU case law⁶⁴, and [Section 60 of the Competition Act 1998](#) requires UK regulators and courts to follow EU jurisprudence. This was confirmed in a statutory instrument, which, as explained by Michael Grenfell of the CMA:

⁶³ Speech by Michael Grenfell, CMA, [A view from the CMA: Brexit and beyond](#), 16 May 2018

⁶⁴ Michael Grenfell, CMA, [UK Competition Law enforcement: the post-Brexit future](#), 11 June 2019

...provides for a new section 60A of the Competition Act requiring the CMA, and the sector regulators and the courts (including the Competition Appeal Tribunal), to apply the UK competition prohibitions consistently with pre-Brexit EU case law, subject to a number of exceptions that give the flexibility to diverge in certain specified circumstances – for example, where there are differences between UK and EU markets, or where there have been developments in forms of economic activity since the relevant EU case, or in the light of ‘generally accepted principles of competition analysis’.⁶⁵

A Commons Library briefing, CBP-4814 [The UK competition regime](#), discusses various options for competition arrangements after Brexit.

There is as yet little indication of any proposals for divergence from EU regulations in the general area of competition. As noted above, many areas of competition law reflect a wider global consensus. That and the preparations made to date may make this a less problematic area for agreement.

3.2 UK negotiating position

The UK’s [February 2020 negotiating objectives](#) (Chapter 16) highlight a desire for both parties “to maintain effective competition laws, covering merger control, anticompetitive agreements and abuse of dominance, while maintaining the right to provide for public policy exemptions.” The document argues that there is no need for legal or regulatory alignment. Rather, it promotes “regulatory freedom to respond to new and emerging challenges in these areas”.

It argues for “transparent, non-discriminatory rules and enforcement procedures” and “effective cooperation”. The proposed approach would reflect recent agreements with Canada, Japan and South Korea in excluding competition issues from the wider proposed dispute resolution mechanism.

3.3 EU negotiating position

With regard to competition, [the EU’s negotiating directives](#) adopted on 25 February propose that:

97. The envisaged partnership should provide that anticompetitive agreements, abuses of dominant position and concentrations of undertakings that threaten to distort competition are prohibited, unless remedied, in so far as they affect trade between the Union and the United Kingdom. The Parties should also commit to effective enforcement via a competition law and domestic administrative and judicial proceedings, permitting the effective and timely action against violations of competition rules, and to effective remedies.

3.4 Standards in EU FTAs

Most free trade agreements contain provisions on competition. Competition policy chapters or clauses can cover a range of issues, such

⁶⁵ Speech by Michael Grenfell, CMA, [UK Competition Law enforcement: the post-Brexit future](#), 11 June 2019

as commitments to comply with domestic competition laws, international policy co-ordination or procedural safeguards. This is also true for EU trade agreements.

Canada

Chapter 17 of the [CETA](#) sets out arrangements for competition, highlighting “the principles of transparency, non-discrimination, and procedural fairness”. Any exclusions will be transparent and both parties will share relevant information about such exclusions. There are no arrangements for dispute settlement. CETA also refers to a more detailed [1999 agreement between the EU and Canada on the application of competition laws](#).

Japan

[Chapter 11 of the EU-Japan Economic Partnership Agreement](#), which builds on [a 2003 agreement](#) on anti-competitive activities, promotes similar principles. It permits exemptions, “provided that such exemptions are transparent and are limited to those necessary for securing public interest. Such exemptions shall not go beyond what is strictly necessary to achieve the public interest objectives that have been defined by that Party”. The agreement is not subject to wider arrangements for dispute resolution.

South Korea

[Chapter 11 of the EU-South Korea Free Trade Agreement of 2010](#) also highlights general principles of the type mentioned above. In comparison with the Canadian and Japanese agreements, it discusses the role (and protection) of public monopolies and enterprises in more detail. The agreement is not subject to wider arrangements for dispute resolution.

4. State-owned enterprises

4.1 Background to the negotiations

With growing global participation of state-owned enterprises (SOEs) in cross-border trade and investment, various countries have moved to support effective competition among all market participants, both publicly and privately owned. There are, for example, [initiatives in the framework of the Organisation for Economic Co-operation and Development](#) (OECD). [The principle of competitive neutrality](#), central to this policy area, implies that companies are not advantaged (or disadvantaged) on the market solely because of their ownership or nationality.

The EU has its own rules on SOEs and entities entrusted with certain public services. Their core principle is that such enterprises are subject to competition and state aid rules in the same way as any other business. However, this obligation goes as far as not to obstruct their ability to perform the services entrusted to them. All EU Member States have similar rules. An [OECD working paper](#) summarises the EU regime:

The TFEU sets the rules for entities that perform public services on a commercial basis or are granted special or exclusive rights. Broadly, Article 106 TFEU provides that the services performed by government entities, or private entities on behalf of the government, should be subject to the competition provisions of the EC Treaty unless the application of such rules obstructs the performance of the particular tasks assigned to them under the law.

In practice it means that such companies have to abide by the general principles of competition and state aid law and their subsidised activities have to be clearly separated from potential commercial activities to avoid them using excess public resources to support their commercial endeavours.⁶⁶

The Political Declaration did not refer to provisions for state-owned enterprises. But this is part of the EU and [UK competition and state aid policy](#) and a concern in international trade. Therefore, it's not surprising that both the EU and UK have included more explicit obligations on level playing field in this area in their respective negotiating positions.

The proposed obligations would address anti-competitive behaviours by SOEs, designated monopolies (sole suppliers of a particular service) and commercial enterprises to which public bodies have granted special rights in order to perform particular services. The latter can refer to services such as energy, water, public transport or certain social services, which public authorities contract out to private businesses but financially support their provision.

⁶⁶ [“Competitive Neutrality and state-owned enterprises: challenges and policy options”](#), OECD Corporate governance working papers, 2011, p12

4.2 UK negotiating position

The Government's [command paper](#) of 27 February states (Chapter 22) states:

69. The Agreement should ensure that the UK and EU's State Owned Enterprises operate in a fair and transparent manner and do not discriminate against businesses in the other party when buying and selling on commercial markets.

70. These provisions should apply to business enterprises where the state has significant control through full, majority, or minority ownership. They should cover designated monopolies and any enterprise granted special rights or privileges by the State.

The government does not refer to a particular EU free trade agreement as a model for commitments on SOEs.

4.3 The EU negotiating position

The EU's negotiating directives of 25 February propose to include provisions on state-owned enterprises, designated monopolies and enterprises with special rights or privileges "that would prevent those types of companies from distorting competition or creating barriers to trade and investment" (para 98).

The IPPR briefing [Negotiating the level playing field](#), comments that, in effect, the EU aims to ensure that its rules on state aid and competition continue to apply to the UK in future.⁶⁷

4.4 Standards in EU FTAs

Various EU FTAs include clauses on state-owned enterprises.

[Chapter 17](#) of CETA, covering competition policy, includes a reference to state-owned enterprises. The EU has obtained a caveat: the competition rules will be applied to entities entrusted with certain public services "in so far as the application of these rules does not obstruct the performance" of the particular tasks assigned to them (Article 17.2.2).

[Chapter 18](#) on state enterprises, monopolies and enterprises with special rights requires both sides to ensure that such enterprises would not discriminate against goods, services, or investments from the other party. This is to ensure that competition between private and state-owned companies is not negatively affected.

The EU-Japan Economic Partnership Agreement has a distinct [Chapter 13](#) covering SOEs, enterprises with special rights and designated monopolies. Under this clause the parties commit to respecting relevant international standards and the principle of non-discrimination. SOEs are not allowed to treat other parties' companies, services or products differently to their local counterparts when buying and selling on commercial markets.

⁶⁷ Marley Morris, [Negotiating the level playing field](#), IPPR, 5 March 2020

4.5 Scope for agreement

The issues around SOEs may not be contentious as both sides seem to agree that state-owned enterprises and companies with special rights should not enjoy market-distorting advantages such as excessive government subsidies which a company could use to boost its commercial activities. For example, speaking at the WTO on 3 March, International Trade Secretary Liz Truss called for a crackdown on unfair trade practices and protectionism as she called for improved WTO rules on “industrial subsidies, state-owned enterprises and forced technology transfer”.⁶⁸

⁶⁸ Department for International Trade Press Release [Britain is back: Liz Truss calls for new rules at WTO to tackle unfair trade practices](#), 3 March 2020

5. Taxation

5.1 Background to the negotiations

Historically, taxation has remained very largely a Member State competence. The major exception to this generalisation is indirect tax: primarily VAT – for which there is a substantive body of EU law establishing common rules across Member States – and, to a lesser extent, excise duties. There are no equivalent provisions with regard to other taxes, though all national legislation has to comply with the overarching provisions of the Treaty guaranteeing the free movement of goods, persons, services and capital across the Single Market and prohibiting discrimination.⁶⁹ Concerns about the scale of tax avoidance and evasion, both across the EU and internationally, have resulted in the introduction of a number of EU instruments relating to administrative cooperation to exchange information and help tackle tax evasion.

Given this, the prospect that a future UK-EU agreement might contain substantive provisions regarding tax has not been widely discussed.

As explained in section 1, the Protocol on Ireland/Northern Ireland in the [draft Withdrawal Agreement](#) agreed in November 2018 included level playing field commitments regarding taxation, though, in comparison to other areas, these were relatively brief and appear to have been uncontroversial. Both parties committed to implementing the principles of good governance in the area of taxation, including global standards on transparency and exchange of information, fair taxation and OECD standards against [Base Erosion and Profit Shifting \(BEPS\)](#). The UK stated that it would continue to apply its domestic law which transposes EU Directives on the exchange of information on taxation ([Directive 2011/16](#)), anti-tax avoidance rules ([Directive 2016/1164](#)), and country-by-country-reporting by credit institutions and investment firms ([Directive 2013/36](#)). Finally the UK reaffirmed its commitment to curb harmful tax measures as defined in the EU Code of Conduct for business taxation (a political agreement, as opposed to a legal instrument, [agreed in 1997](#)).⁷⁰

The [revised Political Declaration](#), agreed in October 2019, mentions taxation in its discussion of level playing field provisions, noting that the Parties should “commit to the principles of good governance in the area of taxation and to the curbing of harmful tax practices.”⁷¹

5.2 EU and UK negotiating positions

The EU’s negotiating directives confirm its view that a commitment to “implementing the principles of good governance in taxation” should

⁶⁹ For more details see, HMG, [Taxation report: review of the balance of competences](#), 28 November 2012.

⁷⁰ [Withdrawal Agreement and Political Declaration](#), 25 November 2018 pp353-4

⁷¹ [Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#), 19 October 2019, para 77. An overview of the EU initiatives to tackle harmful tax competition on the Commission’s site ([ret’d March 2020](#)).

feature in a future UK-EU agreement, and that at the end of the transition period the UK should apply common standards to those applicable in the EU in a number of tax-related areas:

99. The envisaged partnership should recognise and commit the Parties to implementing the principles of good governance in the area of taxation, including the global standards on transparency and exchange of information, fair taxation, and the OECD standards against Base Erosion and Profit Shifting (BEPS).

It should ensure that the United Kingdom applies the common standards applicable within the Union and the United Kingdom at the end of the transition period in relation to at least the following areas: exchange of information on income, financial accounts, tax rulings, country-by-country reports, beneficial ownership and potential cross-border tax planning arrangements.

It should also ensure that the United Kingdom applies the common standards applicable within the Union and the United Kingdom at the end of the transition period in relation to the fight against tax avoidance practices and public country-by-country reporting by credit-institutions and investment firms.

100. The envisaged partnership should reaffirm the Parties' commitment to curb harmful tax measures, taking into account the G20-OECD BEPS Action Plan. They should also ensure that the United Kingdom reaffirms its commitment to the Code of Conduct for Business Taxation.⁷²

The UK Government's command paper of 27 February briefly sets out the UK's position on including tax measures in the level playing field provisions:

79. While not commonplace in EU FTAs, the Agreement could include commitments to the principles of tax good governance as reflected in international standards, including on tax transparency, exchange of information, fair taxation and the Base Erosion and Profit Shifting (BEPS) minimum standards.

80. The Agreement should not constrain tax sovereignty in any manner.

81. The provisions of this chapter should not be subject to the Agreement's dispute resolution mechanism outlined in Chapter 32.⁷³

Prior to the paper's publication, the Prime Minister's statement on the UK's approach stated the UK would not agree to measures in a number of areas "which go beyond those typically included in a comprehensive free trade agreement"; tax was one of these mentioned.⁷⁴

5.3 Scope for agreement

In the IPPR briefing [Negotiating the level playing field](#), Marley Morris concludes that the UK is willing to commit to general principles on good

⁷² European Commission, [Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland](#), COM(2020) 35, 3 February 2020, paras 94-5

⁷³ HMG, [The Future Relationship with the EU: The UK's Approach to Negotiations](#), CP211, 27 February 2020 p17

⁷⁴ [HC Deb 3 February 2020 vol. 672 c1WS](#).

tax governance, but it will probably seek to reject proposals for the UK to follow specific areas of EU law, given this conflicts with the UK's position of regulatory autonomy. All in all, with regard to taxation:

... there is most likely greater scope for compromise than in competition and state aid policy, given any disagreement here would relate to a relatively limited area of EU law.⁷⁵

⁷⁵ Marley Morris, [Negotiating the level playing field](#), IPPR, 5 March 2020, p14

6. Labour and social standards

6.1 Background: Labour standards in EU trade agreements

Since 2008, the EU has included provisions on labour standards in its trade agreements with third countries. The EU is not unique in this regard. Many trade agreements contain provisions on labour and social issues, although the content and form can differ.⁷⁶

EU trade agreements typically include provisions on labour standards in the Trade and Sustainable Development (TSD) chapters. There is variation within the EU's trade agreements but in general TSD chapters include the following sorts of provisions:

- Commitments to certain multilateral standards – typically the International Labour Organisation's (ILO) core labour standards;
- Obligations not to waive, or derogate from, or fail to enforce national labour laws in order to encourage trade or investment;
- Commitments to seek to ensure high levels of labour protection;
- Commitments to dialogue and cooperation; and
- Establishing a Committee and national advisory groups to oversee implementation of the TSD chapters.

The obligations are typically enforced by state-to-state dispute settlement, involving, ultimately, arbitration before a panel of experts. However, decisions by the panel are usually non-binding.

Commitments to multilateral standards

EU TSD chapters always include commitments to certain multilateral labour standards that the parties have already signed up to. In most cases, the reference point is ILO standards. Most EU trade agreements use the core labour standards set out in the [1998 ILO Declaration on Fundamental Principles and Rights at Work](#). In an evidence session before the Lords EU Internal Market Sub-committee on the level playing field, Dr Damian Raess, Professor at the World Trade Institute, explained the rights covered by these agreements:

I mentioned the ILO core labour standards, for instance the elimination of forced labour/slave labour. It is also about the abolition of child labour; there is general agreement on that. It is also about the recognition of freedom of association and an effective right to collective bargaining, which, as you might know, is more contested across the world. None the less, by virtue of mere membership of the ILO, countries need to abide by these standards. That is as a result of the 1998 declaration that I mentioned. The other core labour standard that I did not mention

⁷⁶ See James Harrison, [“The Labour Rights Agenda in Free Trade Agreements”](#), 20(5) *Journal of World Investment and Trade*, 2019, pp 705-725

is non-discrimination in respect of employment and occupation. These are really non-negotiable minimum standards.⁷⁷

Some EU trade agreements list further multilateral standards. For example, in CETA, the EU-Canada free trade agreement, the parties also commit to the [ILO's Decent Work Agenda](#).⁷⁸

The UK is already a party to most of the key ILO instruments. However, the ILO Conventions are not normally relied upon by parties before UK courts. In a legal opinion for the TUC on Brexit and workers' rights, Michael Ford QC, a barrister and Professor of Law at the University of Bristol, said that the ILO Conventions "have had little independent practical effect on UK labour laws."⁷⁹

Commitment to enforce domestic labour laws

In addition to commitments to international standards, EU trade agreements also contain obligations relating to the parties' own domestic labour standards. These are often referred to as 'non-regression clauses'.

A typical example of this clause can be found in Article 23.4 of CETA:

1. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards.
2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, 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 labour law and standards to encourage trade or investment.

The clause is made up of hard and soft obligations. Article 23.4 provides that the parties "shall not waive" and "shall not [...] fail to enforce" their domestic labour standards. By contrast, the parties only "recognise that it is inappropriate" to lower their labour standards.

Slightly stronger wording is used in the recent EU-Japan Economic Partnership Agreement. Article 16.2 provides:

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.

There is academic debate over whether it is accurate to label these provisions 'non-regression clauses'. In the evidence session before the Lords EU Internal Market Sub-committee, Dr Lorand Bartels said:

⁷⁷ House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q1

⁷⁸ CETA, Article 23.3

⁷⁹ Michael Ford QC, [Workers' rights from Europe: the impact of Brexit \(Advice\)](#), TUC, 7 April 2016, para 10

[...] usually you are not prohibited from lowering your standards; you are only prohibited from failing to implement the standards you already have. That is a significant difference.

There is some ambiguity in two agreements that I know of, but my reading is that it is the same in those agreements; one is the EU-Japan agreement and the other is the CARIFORUM-EU agreement.⁸⁰

In either case, these clauses are not blanket prohibitions as parties are only prevented from taking steps to encourage trade or investment.

Dispute settlement

The EU's TSD chapters contain their own separate provisions on dispute settlement. These are typically state-to-state mechanisms, although parties must be open to receiving complaint from the public and are required to set up national advisory groups, with civil society input, which can submit opinions.

In CETA, the first means for the resolution of disputes is consultation between the parties. If a matter is not resolved, it can be referred to arbitration before a Panel of Experts. However, the panel's recommendations are ultimately non-binding and the parties cannot impose trade sanctions in response to breaches.⁸¹

The EU's approach to dispute settlement is widely recognised as weak and weaker than comparable provisions in other trade agreements. Dr Bartels explained:

In terms of enforcement, yes it is true that there is a big difference in the EU's approach to enforcement of labour and environmental standards and the approach, for instance, of the United States and of Canada—and Chile, incidentally. They allow for fines and for trade sanctions. The EU's approach has never been to have fines and trade sanctions. In fact, the EU is coming under a lot of pressure internally from the trade unions to have fines and trade sanctions to upgrade its enforcement of these sorts of provisions.⁸²

More broadly, academics have questioned the effectiveness of the labour standards provisions in the EU's trade agreements. A recent paper by academics for the University of Warwick's Centre for the Study of Globalisation and Regionalisation concluded that TSD chapters are generally not effective:

What is more debatable is the extent to which TSD chapters have had any positive impact on workers' rights in practice. A critical mass of studies (including our own) which have examined the effectiveness of the EU's approach by conducting interviews with

⁸⁰ House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q3

⁸¹ CETA Articles 23.9 and 23.10. See Lorand Bartels, "[Human Rights, Labour Standards and Environmental Standards in CETA](#)", *University of Cambridge Faculty of Law Research Paper No. 13/2017*, February 2017, pp 7-9

⁸² House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q4

key stakeholders and visiting the countries affected have presented a pessimistic picture.⁸³

6.2 EU negotiating position

Non-regression of labour standards

The EU's negotiating mandate, adopted on 25 February 2020, states that the future UK-EU agreement must "ensure that the level of labour and social protection provided by laws, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period".⁸⁴ In addition, it states that the agreement must ensure the UK's effective enforcement of domestic labour laws, including effective labour inspections and judicial proceedings.

In this respect, the EU's approach broadly reflects the position agreed between the UK and the EU in the October 2019 Political Declaration.⁸⁵

The EU's approach was also previously reflected in the provisions on labour and social standards that were included in the Protocol on Ireland / Northern Ireland in the November 2018 Withdrawal Agreement.⁸⁶ This was made up of three elements:

- 1 A clause prohibiting the parties from reducing their domestic labour laws below "common standards applicable within the Union and the United Kingdom at the end of the transition period" (Annex 4, Article 4)
- 2 A commitment to the ILO Conventions (Annex 4, Article 5)
- 3 A clause requiring the effective enforcement of labour laws (Annex 4, Article 6)

The most important provision was Article 4 which was understood as prohibiting the UK from reducing its labour standards below the levels set by EU law at the end of the transition period.⁸⁷

This provision prohibited any lowering of standards, not only actions aimed at encouraging trade or investment. The Institute of Public Policy Research (IPPR) noted that these provisions were stronger than those typically found in EU trade agreements, albeit that they were weaker than the status quo of EU membership.⁸⁸

⁸³ James Harrison, Ben Richardson, Liam Campling, Adrian Smith and Mirela Barbu, "[Taking Labour Rights Seriously in Post-Brexit UK Trade Agreements](#)", *CSGR Working Paper 284/17*, Centre for the Study of Globalisation and Regionalisation, University of Warwick, 2017, p15

⁸⁴ EU negotiating directives, para 101

⁸⁵ Revised Political Declaration, para 77

⁸⁶ [The UK's EU Withdrawal Agreement](#), Commons Library Briefing Paper CBP-8453, 11 April 2019, pp119-120

⁸⁷ HM Government, [EU Exit: Legal position on the Withdrawal Agreement](#), Cm 9747, December 2018, para 54

⁸⁸ Marley Morris and Tom Kibasi, "[The Brexit Withdrawal Agreement: A First Analysis](#)," IPPR, November 2018

In the evidence session before the Lords EU Internal Market Sub-committee, Nicola Smith from the TUC noted that such a provision was possible because of the unique relationship between the UK and the EU:

This is the only international trading relationship we can think of where both parties start from a point of common convergence to a set of minimum standards. In other international trading arrangements, you would not start from anywhere near a level basis or a common regulatory framework. You would have to make very significant changes in your internal regulatory protections to your domestic legislation to allow you to get to that point. This is a unique situation; we are starting with a very large geographically close trading partner with which we already have a common framework of minimum protections.⁸⁹

The EU's longstanding position has been that the labour standards provisions that are typically found in EU trade agreements would be insufficient for a trade deal with the UK. Slides produced by the European Commission in January 2018 argued that if the UK was able to reduce standards below the levels set by EU law not only could it give the UK a trade advantage but it could also undermine Europe as an area with high levels of social protection.⁹⁰

Upholding common high standards

In addition to the mentions of non-lowering of labour standards, the EU negotiating mandate also contained a new statement that the parties should "uphold common high standards, and corresponding high standards over time with Union standards as a reference point".⁹¹

As noted in section 1.5 this line has led some to suggest that the EU is calling for dynamic alignment; an ongoing commitment by the UK to continue to match new EU labour standards adopted after the end of the transition period.

Dispute settlement

The EU's negotiating mandate is unclear on precisely what dispute settlement mechanisms are envisaged for the provisions on labour and social standards. Under the November 2018 Withdrawal Agreement, the provisions on labour standards were specifically excluded from the arbitration mechanisms and were to be resolved only through discussion in the Joint Committee.⁹²

Dr Bartels said of the EU's negotiating mandate:

The mandate is very strong when it comes to unilateral enforcement. When it comes to normal dispute settlement it is normal, which is strong. But when it comes to environment and labour it is very ambiguous. It is hard to know what is going on there. Having a fairly close read of the terminology used, I think it

⁸⁹ House of Lords EU Committee, Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q1

⁹⁰ European Commission, [Internal EU27 preparatory discussions on the framework for the future relationship: "Level Playing Field"](#), TF50 (2018) 27, 31 January 2018.

⁹¹ EU negotiating directives, para 94

⁹² November 2018 Withdrawal Agreement, Protocol on Ireland / Northern Ireland, Annex 4, Article 4(2)

could be read as being both normal dispute settlement for labour and environment, meaning sanctions, but it could also be read as the normal EU dispute settlement for these provisions, which means that it is not really enforceable—and one can contrast that with what they say for state aid, where the language looks much more like properly enforceable dispute settlement.⁹³

The EU's mandate is clear that questions relating to the interpretation of EU law, such as the EU's employment rights directives, should be referred to the European Court of Justice.⁹⁴

6.3 UK negotiating position

In a House of Commons debate on the revised Withdrawal Agreement and Political Declaration in October 2019, Stephen Barclay, then Brexit Secretary, referred to the reciprocal level playing field commitments in the Declaration which he said was in keeping with the commitments from the Government previously sought by MPs to maintain standards on workers' rights:

Paragraph 77 sets out our commitment to high international standards and to their being reciprocal, as befits the relationship that we reach with the European Union... we in this House will set regulation that is world leading and best in class ... with its world-leading regulation on the environment, and that reflects the commitments that many in the House have sought on workers' rights.⁹⁵

However, in his [Written Statement](#) on 3 February 2020, the Prime Minister made clear that the Government would not agree to the kind of level playing field commitments sought by the EU. These should not go beyond those typically included in a comprehensive free trade agreement.

The specific approach on labour standards was set out in the UK Government's negotiating mandate on 27 February. It states that the future UK-EU agreement should contain provisions on labour that are similar to those contained in other EU free trade agreements. It states:

The Agreement should include reciprocal commitments not to weaken or reduce the level of protection afforded by labour laws and standards in order to encourage trade or investment. In line with precedent, such as CETA, the Agreement should recognise the right of each party to set its labour priorities and adopt or modify its labour laws.⁹⁶

The mandate also states that, in line with other EU trade agreements, labour standards provisions should not be subject to the general dispute settlement mechanisms under the treaty. It does not state what sort of dispute settlement mechanism would apply in the area of labour standards.

⁹³ House of Lords EU Committee, EU Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q7

⁹⁴ EU negotiating directives, para 160

⁹⁵ [HC Deb 19 October 2019 vol. 666 c602](#).

⁹⁶ UK negotiating objectives, para 75

Dr Bartels has noted that while the UK mandate refers to CETA, the clause that it is calling for goes beyond CETA, insofar as CETA does not prohibit the parties from lowering their domestic labour standards.⁹⁷

The UK has called for a more limited provision on labour standards than that which the EU has called for, and that which appeared to be envisaged by the Political Declaration.

6.4 Views on scope for agreement

In the evidence session before the Lords EU Internal Markets Sub-committee, Dr Bartels and Dr Holger Hestermeyer, discussed the rationales for including, or removing, the stronger provision envisaged by the EU:

Dr Holger Hestermeyer: This drives to the core of what is going wrong with the discussion. If there is no intention ever to take back standards, why not have an obligation not to do so? Build in flexibility for emergencies if that is what we are worried about. At least at times, the position of the Government is to say, "We don't want to be bound at all. We want the theoretical freedom to do everything". A theoretical freedom that we will never use is of questionable value if you take on very real costs for it. If the intention is not to go back, formulate the obligations in such a way that the flexibility that is needed as a minimum is in there, and see whether that flies.

Dr Lorand Bartels: But the argument can be made that precisely the opposite conclusion can be drawn, which is that if the assumption is that the UK will never change, why would you need an obligation? You can play this one in both directions.⁹⁸

Marley Morris of the IPPR, has categorised labour standards as an area where there is a 'medium-high' chance of a compromise.⁹⁹

However, trade unions have been critical of the position called for by the UK. Nicola Smith from the TUC told the Lords EU Internal Markets sub-committee:

I honestly think that the way forward is to take the heat out of it. If no one is willing to say on record that they want the sovereign right to deviate from these standards or to reduce them or to compete on a low-road basis, what is all the heat in the situation for? Why not be positive and optimistic about our capacity to compete on a positive basis, agree to the level playing field and use that as the basis to achieve preferential trading terms that will be for everyone's benefit?¹⁰⁰

In this context it should be noted that the UK Government removed clauses from the *European Union (Withdrawal Agreement) Bill* (now the [European Union \(Withdrawal Agreement\) Act 2020](#)) which would have provided some limited domestic legal protections for EU-derived workers' rights. The Government did commit to re-introducing these

⁹⁷ House of Lords EU Committee, EU Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q3

⁹⁸ House of Lords EU Committee, EU Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q6

⁹⁹ Marley Morris, [Level playing field – IPPR briefing](#), IPPR, 27 February 2020

¹⁰⁰ House of Lords EU Committee, EU Internal Market Sub-Committee, [Uncorrected oral evidence: The level playing field and state aid](#), 27 February 2020, Q8

provisions in a forthcoming *Employment Bill*. This is covered in detail in the Library Insight, [Removal of workers' rights in the new EU \(Withdrawal Agreement\) Bill](#).

7. Environmental protection

7.1 Background to the negotiations

Environmental issues are often transboundary in scope. As such environmental principles, laws and policies in the UK originate from a mesh of international agreements, EU legislation and domestic law. A number of international agreements have been ratified by both the UK and the EU, which in turn are implemented through a mixture of EU and UK legislation. As the environment is a devolved policy competence, the devolved Administrations also have powers to make their own primary and secondary legislation within the environmental sphere and have increasingly taken divergent routes in many areas.

EU legislation relates to a wide range of matters which come into the environmental sphere, including; biodiversity, farming and forestry, fisheries, air pollution, water quality, waste and resources and climate change. There is no definitive or official definition of what falls under the term “environment”.

Environmental principles

EU environment policy is based on Articles 11 and 191-193 of the the [Treaty on the Functioning of the European Union](#) (TFEU).¹⁰¹ The TFEU states that policy on the environment shall be based on the “precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”.¹⁰²

The *EU (Withdrawal) Act 2018, as amended*, does not retain the overarching EU environmental principles in domestic law as it will for other specific environmental legislation. Schedule 1 of the Act rules out any general principles of EU law as a basis for challenge in UK courts following the end of the implementation period completion day. The potential loss of these principles was identified during the passage of the 2018 Act through Parliament as significant for the future of environmental decision-making in the UK.

Environment Bill 2019-20

In both the previous and current Parliamentary sessions, the UK Government has introduced Environment Bills. The *Environment Bill 2019* passed second reading but fell at dissolution for the General Election 2019. The current [Environment Bill 2019-20](#) reintroduced broadly the same provisions as its predecessor. In particular, some of its provisions cover future environmental principles and governance in the UK following the end of the transition period under the Withdrawal Agreement.

The Bill specifies a series of environmental principles and requires the publication of a policy statement on these principles setting out how they are to be applied by Ministers during policymaking. The principles

¹⁰¹ EU, [Treaty on the Functioning of the European Union](#), 2012/C 326/01

¹⁰² *Ibid*, Article 191

are: 1) environmental protection should be integrated into policy-making principle; 2) the preventative action to avert environmental damage principle; 3) the precautionary principle; 4) environmental damage should as a priority be rectified at source principle and 5) the polluter pays principle.¹⁰³

The Bill will also establish an Office for Environmental Protection (OEP), which will have scrutiny, advice and enforcement functions.

New provisions in the current Bill include what the Government has called “a UK Environmental Protections policy”.¹⁰⁴ They are:

- a requirement on Ministers to make a statement to Parliament setting out the effect of new primary environmental legislation on existing levels of environmental protection; and
- a requirement on the Secretary of State to conduct a two-yearly review of the significant developments in international legislation on the environment, and to publish a report on their findings every two years.

Further reading

For further information about the provisions in the Environment Bill 2019-20, their background, context and reaction to them, see Commons Library briefing paper, CBP-8824 [Commons Library analysis of the Environment Bill 2019-20](#).

For further information about EU environmental law in the UK and examples of it, see section 1 of Commons Library briefing paper, CBP-8132 [Brexit and the environment](#).

The European Green Deal

In December 2019 the European Commission published a communication called The European Green Deal.¹⁰⁵ It is described as resetting “the Commission’s commitment to tackling climate and environmental-related challenges that is this generation’s defining task.”¹⁰⁶ It presents an initial roadmap of the key policies and measures needed to achieve a number of goals. Commentators have stated that they expect the European Green Deal to “significantly alter EU environmental law over the next five years”.¹⁰⁷

Proposals in earlier stages of negotiations

November 2018 Withdrawal Agreement and Political Declaration

The Protocol on Ireland / Northern Ireland in the November 2018 [Withdrawal Agreement](#) contained commitments on the environment. Part Two of Annex 4 (Articles 2 and 3) related to environmental protection. This was made up of a number of elements, including:

¹⁰³ Clause 16(5), *Environment Bill 2019-20*

¹⁰⁴ HM Government, [Environment Bill 2020 policy statement](#), 30 January 2020

¹⁰⁵ European Commission website, [A European Green Deal](#) (downloaded on 23 December 2019)

¹⁰⁶ European Commission, Communication from the Commission, [The European Green Deal](#), COM(2019) 640 final, 11 December 2019

¹⁰⁷ “Q&A: What’s at stake for the environment in post-Brexit talks” [ENDSReport](#), 21 February 2020 [subscription required]

- Article 2(1) on non-regression clause, whereby parties agreed not to lower their environmental protection standards in relation to a number of specified areas below the common level set by EU law at the end of the transition period;
- Article 2(2) requiring that the EU and UK respect the following four environmental principles in their respective environmental legislation: the precautionary principle; the principle that preventive action should be taken; the principle that environmental damage should as a priority be rectified at source; and the “polluter pays” principle.
- Article 3(2) requiring the UK to establish an “independent and adequately resourced body or bodies” to carry out monitoring, reporting, oversight and enforcement of the environmental provisions.

October 2019 Withdrawal Agreement and Political Declaration

As discussed in previous sections, these level playing field commitments were not included in the revised Protocol on Northern Ireland/Ireland in the November 2018 Withdrawal Agreement.

The strengthened level playing field text in the [revised October 2019 Political Declaration](#) stated that the future relationship agreement should include a commitment to “maintain environmental [...] standards at the current high levels provided by the existing common standards.”¹⁰⁸

Is the UK seeking to diverge from EU regulations?

In a 25 October 2019 PQ response to a question about the Johnson Withdrawal Agreement and Political Declaration and the potential effect on the environment, the Government stated:

Our high regulatory standards are not dependent on EU membership. The UK has an exceptional track record on environmental protection and this will not change after we leave the EU. Our landmark Environment Bill, introduced last week, marks a key step towards achieving a Green Brexit, and demonstrates how the UK is leading the world in setting legally binding domestic targets on environmental protection.

The response also referred to the Political Declaration commitments to uphold the common high standards applicable in the the EU and the UK at the end of the transition period.¹⁰⁹

In October 2019 Dr Brendan Moore of the Brexit & Environment research network concluded that:

Broadly, the new Brexit deal removes many of the provisions that would have constrained UK post-Brexit laws and regulations (either indirectly through e.g. the non-regression principle or directly through e.g. the Joint Committee’s role in setting standards). What remains is a general commitment to high

¹⁰⁸ Revised Political Declaration, para 77

¹⁰⁹ PQ 2941 [on [environment protection](#)], answered on 25 October 2019

standards that could nevertheless be consistent with UK laws diverging considerably from the EU.¹¹⁰

In the second reading debate on the *Environment Bill 2019-20*, the Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs (Rebecca Pow), responded to questions about non-regression on environmental protection as follows:

Many Members raised the issue of non-regression. We have absolutely no plans to reduce our existing level of environmental protection. The existing regulations were implemented during the UK's membership of the EU and are still in force in UK law now. They are enforceable in UK courts and will remain enforceable in UK courts. That has not changed. Any targets introduced through the Bill will not diminish our environmental protections but add to them.¹¹¹

7.2 UK negotiating position

The Conservative Party 2019 election manifesto stated an ambition to “raise standards” in a number of areas, including the environment.¹¹² It also stated that “In all of our trade negotiations, we will not compromise on our high environmental protection, animal welfare and food standards.”¹¹³

The Prime Minister's written statement on UK/EU relations on 3 February 2020 stated that the Government would not agree to measures in relation to level playing field areas, including the environment “which go beyond those typically included in a comprehensive free trade agreement”.¹¹⁴

The Government's command paper on 27 February 2020 proposed a trade agreement chapter on trade with the following ambition:

77. The Agreement should include reciprocal commitments not to weaken or reduce the level of protection afforded by environmental laws in order to encourage trade or investment. In line with precedent, such as CETA, the Agreement should recognise the right of each party to set its environmental priorities and adopt or modify its environmental laws. The Agreement should also include commitments from both parties to continue to implement effectively the multilateral environmental agreements to which they are party. The Agreement should establish cooperation provisions between the parties on environmental issues.

78. In line with precedent such as CETA, EU-Japan EPA and EU-South Korea, these provisions should not be subject to the Agreement's dispute resolution mechanism outlined in Chapter 32.¹¹⁵

¹¹⁰ Brexit & Environment, [Loosening the constraints: The environment in the revised Brexit deal](#), 17 October 2019

¹¹¹ [HC Deb 26 February 2020](#), c425

¹¹² [The Conservative and Unionist Party Manifesto 2019](#), p5

¹¹³ *Ibid*, p57

¹¹⁴ [HCWS86 on UK / EU relations](#), 3 February 2020

¹¹⁵ UK Government, [The Future Relationship with the EU: the UK's Approach to Negotiations](#), 27 February 2020, paras 78-79

7.3 EU negotiating position

The EU's negotiating directives adopted on 25 February 2020 set out the following approach to environmental protection:

The envisaged partnership should ensure that the common level of environmental protection provided by laws, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in relation to at least the following areas: access to environmental information; public participation and access to justice in environmental matters; environmental impact assessment and strategic environmental assessment; industrial emissions; air emissions and air quality targets and ceilings; nature and biodiversity conservation; waste management; the protection and preservation of the aquatic environment; the protection and preservation of the marine environment; health and product sanitary quality in the agricultural and food sector; the prevention, reduction and elimination of risks to human and animal health or the environment arising from the production, use, release and disposal of chemical substances; and climate change. This should take into account the fact that the Union and the United Kingdom share a common biosphere in respect of cross-border pollution. The envisaged partnership should lay down minimum commitments reflecting standards, including targets, in place at the end of the transition period in those areas, where relevant. The envisaged partnership should ensure the Parties respect the precautionary principle and the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

The envisaged partnership should ensure that the United Kingdom implements a transparent system for the effective domestic monitoring, reporting, oversight and enforcement of its obligations by an independent and adequately resourced body or bodies.¹¹⁶

The Institute for Government concluded (on the basis of the European Commission's draft negotiating directives published on 3 February 2020), that on the environment, the EU appears to want "something close to what Theresa May agreed to as part of the previous Withdrawal Agreement: for environment and labour protections, non-regression of current standards, and for the UK public bodies taking the place of the EU Commission to enforce them."¹¹⁷

The reference to health and product sanitary quality in the agricultural and food sector" was a new inclusion in the version of the directives adopted by the Council on 25 February 2020. The title of this section was also amended from "environment" to "environment and health" (all other wording in the above paragraphs remained unchanged). The additional references to health and product quality in agriculture and food related to concerns from Member States, notably France, that the UK would relax standards in these areas in order to accommodate a

¹¹⁶ EU negotiating directives, paras 103-104

¹¹⁷ Institute for Government, [UK-EU future relationship negotiations: how do the opening positions compare?](#) 3 February 2020

trade deal with the USA (for example by allowing imports of chlorinated chicken).¹¹⁸

7.4 Standards in EU FTAs

The EU European Economic and Social Committee summarises that the recently negotiated and implemented FTAs between the EU and partner countries are supposed to support three strands of sustainable development: economic, social and environmental protection. This is done through the inclusion of a trade and sustainable development (TSD) chapter in an FTA as follows:

Similarly, the Parties commit to effectively implement, in their laws and practice multilateral environmental agreements (for example the CITES Convention, Convention on Biological Diversity or the UN Framework Convention on Climate Change), to which they are party.

The Parties also commit not to lower the labour or environmental standards in order to attract trade or investment and express will to cooperate in areas related to sustainable development. This includes facilitation of trade in environmental goods and services, promotion of sustainable renewable energy and energy efficient products, promotion of corporate social responsibility (CSR), and of trade in products subject to ethical or fair trade schemes. Cooperation may also include trade-related aspects of biodiversity, promotion of sustainable fishing, addressing the problem of illegal logging or co-operation on trade-related aspects of climate change policy.

The Parties also commit to monitor impacts of the agreement and to establish monitoring and advisory bodies including independent and representative civil society organisations, such as business associations, trade unions and non-governmental organisations.¹¹⁹

An article by Sam Lowe of the Centre for European Reform provides some examples of how TSD chapters have been incorporated into recent FTAs:

Since its 2009 FTA with South Korea, the EU has included trade and sustainable development (TSD) chapters in its trade agreements, committing both parties to uphold standards contained in multilateral environmental agreements such as the Paris Agreement on climate change and International Labour Organisation conventions. For example, the recently implemented Japan-EU Economic Partnership Agreement (JEEPA) contains a [trade and sustainable development chapter](#); the EU-Canada [comprehensive economic trade agreement](#) (CETA) takes a slightly different approach and instead contains three distinct chapters covering trade and sustainable development (chapter 22), trade and labour (23), and trade and environment (24).¹²⁰

¹¹⁸ "[Barnier pours scorn on Johnson's spokesman ahead of trade talks](#)", *The Guardian*, 25 February 2020.

¹¹⁹ EU European Economic and Social Committee website, [Monitoring of EU Free Trade Agreements](#) (accessed on 14 March 2020)

¹²⁰ Sam Lowe, "[The EU should reconsider its approach to trade and sustainable development](#)", Centre for European Reform, 31 October 2019

The 2016 Canada CETA agreement, for example, contains the following provision on “upholding levels of [environmental] protection” (article 24.5):

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.¹²¹

Article 24.3 of CETA provides the parties with a “right to regulate” as follows:

The Parties recognise the right of each Party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this Agreement. Each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection.

The EU’s 2014 Association Agreement with the Ukraine is often contrasted with CETA as being much more prescriptive in the environmental standards required in it.¹²² For example, Annex XXX to Chapter 6 of Title V on Environment states “Ukraine undertakes to gradually approximate its legislation to the following EU legislation within the stipulated timeframes:” A detailed list of specific environmental legislation then follows.¹²³

7.5 Views on scope for agreement

Academics from the Brexit & Environment network highlight in a blog post how the EU may favour more specific, legally binding commitments, than the less prescriptive approach favoured by the UK Government:

The government may consequently find itself under pressure from the EU to deliver on its manifesto promise not to ‘compromise on our high environmental protection, animal welfare and food standards’. But while both parties may agree on high ambition, the UK government appears intent on a political pledge – whereas the EU favours legally binding commitments.¹²⁴

¹²¹ European Commission, [Comprehensive and Economic Trade Agreement \(CETA\) between the EU and Canada](#), Article 24.5

¹²² “Green standards after Brexit: Will the UK adopt the Ukraine model?” [ENDSReport](#), 30 January 2020 [subscription required]

¹²³ Official Journal of the European Union, [Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part](#), 29 May 2014, Annex XXX to Chapter 6 on Environment

¹²⁴ Brexit & Environment, [“After Brexit Day: Reflections on the paths ahead,”](#) 5 Feb 2020

An article in the specialist environment publication, ENDS Report, set out views from a former trade negotiator on a possible compromise on environmental protection standards between the UK and EU:

What are the chances of a compromise?

While the starting points for the two sides seem far removed, some trade observers believe an agreement can still be reached.

Dmitry Grozoubinski, a former trade negotiator for the Australian government, has suggested there is “a landing zone, somewhere between a commitment to keep regulations roughly as high as they are now, and dynamically aligning with the EU levels of protection into the future”.

This would be unlikely to involve “being bound by the actual regulations they [the EU] use to get there”, he added.¹²⁵

¹²⁵ “Q&A: What’s at stake for the environment in post-Brexit talks” [ENDSReport](#), 21 February 2020 [subscription required]

8. Climate change

8.1 Background to the negotiations

UK law and policy on climate change

The UK is part of an international effort to combat climate change. Both the UK and the EU are parties to the United Nations Framework Convention on Climate Change (UNFCCC) and as such have signed up to international climate change obligations, such as the Paris Agreement.

As part of its contributions to international efforts, the UK has domestic legislation and policies in place to reduce greenhouse gas emissions. The *Climate Change Act 2008* originally established long term statutory targets for the UK to achieve an 80% reduction in greenhouse gases by 2050 against a 1990 baseline (translated into five-yearly carbon budgets). In June 2019, the Government amended this headline target to a 100% reduction (compared to 1990 levels) by 2050 (otherwise known as net zero). Between 1990-2018, the UK cut greenhouse gas emissions across the economy by 40%.¹²⁶ Further discussion of the UK carbon budgets and the *Climate Change Act 2008* (as amended) is set out in the Commons [Library Briefing on UK Carbon Budgets](#) (CBP-7555) and the [Library Briefing on Net Zero in the UK](#) (CBP-8590).

The UK has also contributed to international efforts through being an EU Member State and participating in EU mechanisms such as the EU emissions trading system (EU ETS); and meeting EU targets, for example under the “effort sharing” legislation.

The Clean Growth Strategy (October 2017) explained the Government’s view of the potential impact of Brexit on climate change policies, stating that domestic commitments would not be affected, but that the exact nature of the UK’s future relationship with the EU, including in areas such as the EU ETS were “still to be determined”:

Leaving the EU will not affect our statutory commitments under our own domestic Climate Change Act and indeed our domestic binding emissions reduction targets are more ambitious than those set by EU legislation. The exact nature of the UK’s future relationship with the EU and the long-term shape of our involvement in areas like the EU Emissions Trading System are still to be determined. There are also emerging opportunities to drive more action – for example by putting emission reductions and land stewardship at the heart of a post EU agricultural support policy. We will therefore carefully examine each area of common interest with our EU partners and work to deliver policies and programmes that are at least as beneficial as the current arrangements.¹²⁷

UK carbon pricing consultation

¹²⁶ Committee on Climate Change, [Reducing UK emissions, 2019 Progress Report to Parliament](#), 10 July 2019

¹²⁷ Gov.uk, [Clean Growth Strategy](#), 12 October 2017

In a May 2019 consultation document on the [Future of UK Carbon Pricing](#), the UK Government and devolved Administrations stated that (rather than remaining in the EU ETS) securing a linking agreement with the EU for a linked UK ETS was their preferred option. Alternative carbon pricing options were also consulted on to address a scenario where a linking agreement cannot be secured with the EU.¹²⁸

The consultation provides the following explanation:

Any linking agreement requires a UK ETS to which the EU ETS could link. It is therefore necessary to develop a UK ETS in the first instance. When two ETSs are linked, each system recognises the allowances of the other. This has the effect of creating a single carbon price across both systems. Linking carbon markets can lead to more efficient emissions reduction, since allowances are tradable across a larger pool of participants. This results in a larger number of cost-effective abatement opportunities, as well as greater market liquidity for trading purposes, ensuring lower transactional costs and minimising the risk of market abuse. As well as increasing the efficiency of the system, a link between a UK ETS and the EU ETS would ensure a smooth transition for the relevant sectors. Given that a linking agreement would be subject to negotiation, it is not possible to outline the precise details of such an agreement at this stage.¹²⁹

The proposed scope of a UK ETS is that it matches the scope of the EU ETS both in respect of sectors and greenhouse gases covered. The consultation also sought views on the potential to expand scope in later years of UK ETS operation.

The consultation closed on 12 July 2019 and the feedback is being analysed. More information is available in the Commons Library Briefing, [Brexit: energy and climate change](#) (5 September 2019).

The European Green Deal

In December 2019 the European Commission published a communication called The European Green Deal.¹³⁰ It is described as resetting “the Commission’s commitment to tackling climate and environmental-related challenges that is this generation’s defining task.”¹³¹ It presents an initial roadmap of the key policies and measures needed to achieve a number of goals. The European Commission presented a proposal for a European Climate Law on 4 March 2020, which included a net zero by 2050 target.¹³² During the transition period, the UK will need to continue applying and implementing EU law that falls within the scope of the withdrawal agreement.

November 2018 Withdrawal Agreement & Political Declaration

¹²⁸ Gov.uk, [Consultation on the Future of UK Carbon Pricing](#), 2 May 2019

¹²⁹ Gov.uk consultation, [The future of UK carbon pricing](#), 21 May 2019, p. 16

¹³⁰ European Commission website, [A European Green Deal](#) [accessed 26 February 2020]

¹³¹ European Commission, Communication from the Commission, [The European Green Deal](#), COM(2019) 640 final, 11 December 2019

¹³² European Commission proposal for a regulation: [European Climate law](#), 4 March 2020; and Europa pages on [European Climate Law](#) [accessed 16 March 2020]

The Protocol on Ireland/Northern Ireland in the November 2018 version of the [Withdrawal Agreement](#) contained non-regression commitments on environmental protection, including climate change, should the 'backstop' come into force in Annex 4, Article 2(1) (see section 7.1).

Article 2(4) and (5) also included commitments to international agreements and a requirement on the UK to implementing a carbon pricing system of at least the same effectiveness and scope of the EU ETS:

4. The Union and the United Kingdom shall take the necessary measures to meet their respective commitments to international agreements to address climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the Paris Agreement of 2015.

5. The United Kingdom shall implement a system of carbon pricing of at least the same effectiveness and scope as that provided by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community.¹³³

The November 2018 [Political Declaration](#) reaffirmed the commitment of both the UK and the EU in their future relationship to tackle climate change in international fora and under international agreements; and stated that the future relationship agreement should contain provisions to ensure a 'level playing field' in the future relationship with regard to a number of different matters including climate change.¹³⁴

October 2019 Withdrawal Agreement & Political Declaration

As already discussed in previous sections, the level playing field commitments in the Protocol on Ireland/Northern Ireland were scrapped in the [revised October 2019 Withdrawal Agreement](#) while the [revised Political Declaration](#) included strengthened level playing field commitments for the future relationship. This included a commitment to uphold the common high standards in the area of climate change. It also contained provisions on global cooperation in the area of climate change as follows:

75. The Parties recognise the importance of global cooperation to address issues of shared economic, environmental and social interest. As such, while preserving their decision-making autonomy, the Parties should cooperate in international fora, such as the G7 and the G20, where it is in their mutual interest, including in the areas of:

- a) climate change;
- b) sustainable development;
- c) cross-border pollution;
- d) public health and consumer protection;

¹³³ Gov.uk, [Withdrawal Agreement and Political Declaration](#), 25 November 2018, Annex 4, Part two

¹³⁴ Gov.uk, [Withdrawal Agreement and Political Declaration](#), 25 November 2018, paras 77, 78 and 79

- e) financial stability; and
- f) the fight against trade protectionism.

76. The future relationship should reaffirm the Parties' commitments to international agreements to tackle climate change, including those which implement the United Nations Framework Conventions on Climate Change, such as the Paris Agreement.¹³⁵

On carbon pricing, the revised Political Declaration stated that the Parties should consider cooperation by linking a UK ETS with the EU ETS.¹³⁶

8.2 UK negotiating position

The [UK Government's policy paper: the future relationship with the EU, the UK's approach to negotiations](#) (27 February 2020)¹³⁷ did not include climate change within the proposals for a comprehensive free trade agreement. Instead, climate change and carbon trading are included under a proposed *Agreement on Energy*. It stated that "the UK is open to considering an agreement on energy if it reflects its interests and as long as it respects the fact that the UK will make independent decisions on its energy policies". The agreement would have separate unspecified governance arrangements to the trade agreement.

The Command paper reiterated the UK's commitment to tackling climate change and stated that the energy agreement should reaffirm both sides' commitments under the Paris Agreement, and recognise both parties' right to regulate to meet their respective climate goals. On carbon pricing specifically, it stated:

14. In the context of our approach to carbon pricing, the UK would be open to considering a link between any future UK Emissions Trading System (ETS) and the EU ETS (as Switzerland has done with its ETS), if it suited both sides' interests. Any such agreement would need to recognise both parties as sovereign equals with our own domestic laws. It could:

- a. provide for mutual recognition of allowances, enabling use in either system;
- b. establish processes through which relevant information will be exchanged; and
- c. set out essential criteria that will ensure that each trading system is suitably compatible with the other to enable the link to operate.¹³⁸

As noted in section 1.4, the Prime Minister's [written statement](#) on 3 February 2020 stated that the Government would not agree to measures in climate change policy and other level playing field areas going "beyond those typically included in a

¹³⁵ Political Declaration, paras 75-76

¹³⁶ Political Declaration, para 70

¹³⁷ HM Government, [The future relationship with the EU, the UK's approach to negotiations](#), 27 February 2020, CP211

¹³⁸ HM Government, [The future relationship with the EU, the UK's approach to negotiations](#), 27 February 2020, CP211, Part 2 para 14

comprehensive free trade agreement". It stated its belief that the two parties should recognise their respective commitments to maintaining high standards, agreeing to avoid using trade distorting measures and "confirm that they will uphold their international obligations".¹³⁹

8.3 EU negotiating position

The [EU's negotiating directives](#) were adopted on 25 February 2020. In section 15 on *level playing field and sustainability*, climate change is included as an area in which the envisaged partnership should "uphold common high standards, and corresponding high standards over time with Union standards as a reference point".¹⁴⁰ More specifically on climate change, the document states:

105. The envisaged partnership should reaffirm the Parties' commitments to effectively implement international agreements to tackle climate change, including those established under the United Nations Framework Conventions on Climate Change (UNFCCC), such as the Paris Agreement. They should foster global cooperation to maintain Europe's leadership in combating climate change.

106. The envisaged partnership should ensure that the United Kingdom maintains a system of carbon pricing of at least the same effectiveness and scope as provided by the common standards, including targets, agreed within the Union before the end of the transition period and applicable for the period thereafter. The Parties should consider linking a United Kingdom national greenhouse gas emissions trading system with the Union's Emissions Trading System (ETS). Such linking of systems should be based on the conditions agreed within the Union, ensure the integrity of the Union's ETS and a level playing field, and provide for the possibility to increase the level of ambition over time.

107. The envisaged partnership should also ensure that in areas not covered by a system of carbon pricing, the United Kingdom does not reduce the level of protection below the level provided by the common standards, including targets, agreed within the Union by the end of the transition period and applicable for the period thereafter.

108. The envisaged partnership should ensure the United Kingdom implements a transparent system for the effective domestic monitoring, reporting, oversight and enforcement of its obligations by an independent and adequately resourced body or bodies.

8.4 Standards in EU FTAs

According to the Economist Intelligence Unit report: [climate change and trade agreements Friends or foes?](#) major trade deals make limited reference to climate change:

Major trade deals also make limited reference to climate change. Since the scientific processes of climate change cannot be modified, some observers argue that trade agreements must be made more compatible with climate policies rather than vice

¹³⁹ [HCWS86](#) [on UK / EU relations] 3 February 2020

¹⁴⁰ EU negotiating directives, para 94

versa. A Boston University-based group claims the prevailing model of trade and investment treaties “is largely incompatible with the world’s broader climate goals”, and calls for a redesign to “reward climate-friendly modes of economic activity, curb activity that worsens climate change, and provide the proper policy space so that nation-states can adequately address the climate challenge.”¹⁴¹

According to the European Parliament Research Service, in EU trade agreements, references to climate commitments (such as the Paris Agreement) would be included in the Trade and Sustainable Development chapters (see more in section 7 above).¹⁴²

As mentioned above, the UK Government has proposed that climate change commitments are included in an energy agreement separate to any trade agreement.

8.5 Scope for agreement

The form of any agreement remains subject to negotiation, with the UK proposing a separate energy agreement and the EU including climate change proposals within its general framework for the future economic partnership.

Reaffirming international commitments such as the Paris Agreement and linking a UK ETS with the EU ETS is an option that is proposed as something to be considered by both parties, albeit with different conditions or requirements from each party. Namely, the requirement from the EU on linking a UK ETS would be that it would be based on conditions agreed with the EU to ensure the integrity of the EU ETS and a level playing field.

Going further than the UK’s proposals, the EU proposes that in areas not covered by a system of carbon pricing, the UK does not reduce the level of protection below common standards, including targets, which would need to be agreed by the UK and the EU by the end of the transition period. The EU also requires that the UK implements a system for domestic monitoring, reporting, oversight and enforcement of its obligations by an independent and adequately resourced body or bodies. This may be a role fulfilled by the new Office of Environmental Protection to be created by the *Environment Bill 2019-20*, but the UK Government proposals are silent on this point. See [Commons Library analysis of the Environment Bill 2019-20](#) for further information.

¹⁴¹ The economist intelligence unit, [Climate change and trade agreements: friend or foe?](#) (accessed 27 February 2020)

¹⁴² European Parliament Research Service, [Using trade policy to tackle climate change](#), October 2019 (accessed 27 February 2020)

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