

Greener UK – Written evidence (EEH0030)

Q1. Please indicate which of the following industries or policy areas are you responding in relation to: energy, environment, health, food trade, agriculture, fishing, climate change, chemicals.

1. Greener UK is a coalition of 12 major environmental organisations that came together to ensure that environmental standards and protections are maintained and enhanced during the Brexit process. With the climate and nature crises posing ever greater challenges, we urged the UK and EU to agree a future relationship that enhances work to protect the environment.
2. We will focus primarily on the policy areas of environment, climate change and energy in this response.

Q2. What is your assessment of the relevant provisions in the UK-EU Trade and Cooperation Agreement, and their impact on your business or policy area?

3. The UK-EU Trade and Cooperation Agreement (TCA) includes some welcome environmental provisions such as the classification of climate change as an 'essential element'. Both parties also confirm they are 'determined to maintain and improve their respective high standards' and reaffirm their ambition of achieving economy-wide climate neutrality by 2050 (Part 2 Title XI). However, the majority of the environmental provisions are not enforceable and while sanctions are available in relation to disputes about non-regression, the value of this is limited by the narrow focus on trade and investment impact. Furthermore, the agreement is light on mechanisms to promote shared ambition or joint environmental action and leaves much for both sides to do to establish and communicate new ways of working together.

Q3. What do those provisions achieve?

Non-regression from levels of protection

4. The TCA includes a non-regression provision which seeks to uphold environment and climate standards at the end of the transition period limited to situations where such weakening would impact on trade or investment between the parties (Title XI Article 7.2.2). The inclusion of a trade and investment test is disappointing – providing proof of damaging economic impacts on the other party will be difficult and potentially a protracted undertaking. It is therefore not clear to what extent this provision will act as an effective safeguard against lower standards in the future. A non-regression mechanism that was broader in scope and applied irrespective of possible impacts on trade or investment should have been included in the TCA. However, it is welcome that the provision has a better enforcement mechanism attached, compared to the rest of the environment and sustainable development chapters. Either party can take action via temporary remedies if the other party does not conform to the assessment of a panel of experts in relation to a dispute.

Rebalancing measures

5. Article 9.4 sets out a rebalancing process to allow either party to implement countervailing measures in the event of significant future divergence in environmental and labour standards by one side where these are shown to materially impact on trade or investment in a negative way. The proof for the rebalancing mechanism therefore has a higher threshold than the non-regression provision, although does allow for a unilateral application of safeguards. The measures will be 'restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation [...and] shall be based on reliable evidence and not merely on conjecture' (9.4.2). In principle this will help to protect either side from being held back in progressing higher standards by the threat of being undermined by cheaper lower standard products from the other party. For example, the threat of UK divergence undercutting the EU was put forward by the chemicals industry as a reason the EU should not progress its chemicals safety rules, ahead of publishing its new Chemicals Strategy for Sustainability.¹ This process should be a useful tool given much greater environmental ambition will be needed in the coming years, although the effectiveness of this novel mechanism remains to be seen.
6. An independent arbitration panel will assess the suitability of any countermeasures in a timely manner, and parties are prevented from invoking the WTO agreement to prevent measures being taken (9.4.3(g)). Furthermore, this article allows for a broader review of the balance of the agreement no more than every four years (9.4.4-7). This is a useful provision but again will only be relevant in relation to measures that can be shown to have a material impact on trade or investment.

Enforcement of environmental provisions

7. For environment-related provisions to have a real impact, they must be supported by well-designed and effective governance mechanisms that enable meaningful enforcement where appropriate. However, the full horizontal dispute settlement mechanism applying to the core of the TCA does not apply to the environment or trade and sustainable development chapters. Instead, the agreement provides for a weaker mechanism involving consultations between the parties and the convening of a panel of experts.
8. Helpfully Article 9.2 requires that expert panellists 'have specialised knowledge', work independently, and deliver a final report to the parties which must be made available to the public within 15 days of delivery (9.2.15). However, these provisions do not go beyond a fairly standard role for a panel of experts and the expert report itself is not binding. Sub clauses 9.2.16-18 do set out some additional actions – parties are required to discuss measures to be taken and the Specialised Committee in Level Playing Field shall monitor the follow-up to the report. Unfortunately, 9.2.18 is unclear on how a situation might be resolved where the panel of experts finds that one party has not carried out recommended measures to address a non-conformity.

¹ FT (13 October 2020) 'Chemicals sector faces double blow of Brexit and new EU rules'

9. As set out above, there is an exception for the non-regression provision. 'Article INST.24 [Temporary remedies] and Article INST.25 [Review of any measure taken to comply after the adoption of temporary remedies] shall apply mutatis mutandis.' (9.3.2). This allow parties to take action where the other party does not conform to the report of the panel of experts if divergences are impacting on trade or investment.
10. There are also useful clauses regarding domestic monitoring and enforcement. Article 7.5 requires each party to ensure national administrative or judicial proceedings are available, and where competent domestic enforcement authorities are available, for these to give due consideration to violations and have adequate remedies to support the maintenance of current levels of environmental protection. Article 7.6 requires cooperation between the European Commission and the supervisory bodies in the UK on the effective monitoring and enforcement of environmental and climate law.
11. These commitments will have implications for the set-up of the Office for Environmental Protection (OEP), Environment Standards Scotland and the equivalent environmental governance body in Wales, particularly in regard to the adequacy and availability of sanctions and remedies for enforcement, the independence of these bodies from government and the level and security of their resourcing. The recently announced delay to the Environment Bill and the consequent delay to the OEP assuming its legal functions and powers does not appear compatible with the spirit of these provisions and the effective functioning of the TCA. This is further compounded in Northern Ireland where the additional consent required after the bill has received Royal Assent means that the OEP set-up is on a slower delivery timescale. With no prospect of legislation to establish a governance body in Wales until after the Senedd Cymru elections in spring, there is growing concern of a lengthening accountability gap across the UK.

Climate change

12. The fight against climate change is explicitly specified in Article COMPROV.12 as constituting an 'essential element' of the TCA. This is the first time it has been classified as such in a trade agreement and means any serious breach can lead to the suspension or termination of all or parts of the agreement. Article INST 35 specifies that 'materially defeating the object and purpose of the Paris Agreement' constitutes a serious and substantial failure to fulfil an essential element of this agreement. This is clearly a very high threshold to meet but nonetheless is a very welcome step and demonstrates the crucial importance of climate action to both sides.
13. The Sustainable Development Chapter (chapter eight) specifically commits each party to 'effectively implementing the UNFCCC, and the Paris Agreement' (8.5.2.a), promoting 'the mutual supportiveness of trade and climate policies' (8.5.2.b) and facilitating 'the removal of obstacles to trade and investment in goods and services of particular relevance for climate change mitigation and adaptation' (8.5.2.c). The parties are also committed to cooperation 'on trade-related aspects of climate change policies and measures bilaterally, regionally and in international fora' (8.5.3). However,

these provisions are likely to have limited effect as they are not subject to the TCA's horizontal dispute settlement mechanism and do not focus on achieving specific outcomes.

Energy

14. Although the UK will no longer be a member of the Internal Energy Market, the parties have agreed to create a system for the efficient trading of electricity across interconnectors (Article ENER.13). This will help maximise the potential of the UK's renewable resources and reduce the costs of decarbonisation. However, in substance this is primarily 'an agreement to have an agreement' and the exact arrangements, which will determine the effectiveness of the system, will be negotiated in 2021 and beyond. Much will depend on the effective operation of the new "Specialised Committee on Energy" (Article INST.2(I)) and the development of a new "multi-party agreement on energy" (Article ENER.13.3). The parties will also ensure that cooperative relationships are formed between European and UK technical bodies (Article ENER.19). Both the EU and UK explicitly reaffirm their 2030 renewable energy commitments in the agreement which will act as a welcome baseline from which to measure progress (Article ENER.21).

Q4. What, if any, challenges arise because of those provisions? How could these challenges be resolved?

15. The interpretation and implementation of these provisions will lead to a number of challenges. It is not yet clear how provisions such as rebalancing will work in practice and this is only likely to become apparent through use of the mechanism. Early cases will be important in determining how terms are interpreted – for example, it will be for the arbitration tribunal to decide what is a material impact, significant divergence and reliable evidence. Clearer definitions of the criteria for non-regression and rebalancing will help facilitate the effective use of both measures going forward.
16. We note that the European Commission is winding down the Task Force for Relations with the United Kingdom and establishing a new Service for the EU-UK Agreements to support the efficient and rigorous implementation and monitoring of the TCA and Withdrawal Agreement.² We also note that in its final report the Committee on the Future Relationship with the European Union made the case for Parliament to continue to effectively scrutinise the UK's relationship with the EU.³ Effective mechanisms to monitor and review the implementation of the agreement will be crucial to ensure it is functioning properly. As well as establishing the institutional arrangements set out in the TCA, mechanisms will need to be established to monitor developments and potential divergence in environmental law and policy between the two parties. Parliament and committees such as the EU Environment Sub-Committee can play an important role in scrutinising these new arrangements. Ensuring adequate resourcing of such

² European Commission press release (19 January 2021) 'College meeting: European Commission reorganises the "Task Force for Relations with the United Kingdom" into the "Service for the EU-UK Agreements"'

³ Committee on the Future Relationship with the European Union (21 January 2021) *The shape of future parliamentary scrutiny of UK-EU relations*

mechanisms and opportunities for meaningful engagement with stakeholders will be imperative.

17. The TCA explicitly recognises the importance of civil society participation in its implementation (Article INST.6). We welcome the proposed creation of a 'Civil Society Forum' and will actively engage with both parties to ensure its effective operation. However, there is not much detail provided on civil society engagement beyond INST 6, which requires that civil society is consulted about the implementation of the agreement, and INST 7 and 8, which requires consultation with Domestic Advisory Groups and the Civil Society Forum. Both sides must prioritise developing more detailed proposals for the creation and organisation of these groups.
18. Furthermore, the text lacks opportunities for individuals to engage with the dispute settlement process and directly raise concerns about the application and implementation of the agreement by either party. Establishing a clear process for citizens to be able to raise issues of non-compliance is important as evidence shows that there is very little incentive for parties to launch proceedings against agreement partners in relation to environmental failings.⁴

Q5. What should the UK seek to accomplish with the EU in relation to your industry or policy area within the parameters of the Agreement in the short- and mid-term?

19. This is a relatively 'thin' agreement and many areas, particularly energy, will require substantive further negotiation to fully operationalise the provisions. The agreement also commits the parties to 'give serious consideration to linking their respective carbon pricing systems' (Title XI Article 7.3.6), which we urge them to do given it will produce a more effective scheme.
20. The deal does provide a mechanism whereby all future bilateral agreements between the UK and EU will automatically constitute supplementary agreements to this agreement, unless explicitly stated otherwise (Article COMPROV.2). Thus, the agreement has the potential to be dynamic and adjust over time to reflect new cooperative arrangements between the UK and EU. For example, this framework offers a platform on which a much closer partnership on chemicals and with EU REACH could be negotiated in future.
21. The EU has been our long-time partner on environmental action but this agreement has limited mechanisms to promote shared ambition or joint action on vital environmental issues in the future. Given the UK and EU's proximity, shared environment and shared environmental interests, further negotiation is required to establish new ways of working together.

Sarah Williams, Head of Greener UK unit, Green Alliance on behalf of Greener UK

⁴ Dr Sabaa A. Khan, International Institute for Sustainable Development (2017) 'Environmental and Public Interest Considerations in NAFTA Renegotiation'