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In response to the EU Environment Sub-Committee Inquiry's 'Call for Evidence', we provide some preliminary assessments of the provisions on Environment and Climate change in the UK-EU Trade and Cooperation Agreement, as well as their immediate challenges and impacts.

On the 24th of December 2020, the Trade and Cooperation Agreement (hereafter, "TCA") was concluded between the European Union and the European Atomic Energy Community on one side and the United Kingdom of Great Britain and Northern Ireland on the other side. Environment and climate change are included in two dedicated chapters of the agreement. However, as this early analysis demonstrates, numerous unanswered questions and challenges remain. This is particularly the case in the face of announced delays to the Environment Bill and raises real-world concerns about how the United Kingdom will, in fact, deliver its stated commitments to become a world leader in environmental protection in the run up to COP26.

Questions

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.

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?

What do those provisions achieve?

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

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?"

1. As a Scottish Law Firm, Living Law's expertise focuses on environmental and human rights law across international, EU and national law. Our main concern and interest, hence, lies in **environmental** and **climate** provisions included in the trade agreement and also how they intersect with devolved law and policy in this field.

2. The inclusion of the notion of level playing field and non-regression is broadly welcome in terms of environmental protection¹ to ensure trading of goods that can contribute to and respect sustainable development commitments and also avoid distortions to trade and investment². These provisions mandate that "*the current high standards application in the areas of labour and social standards, environment, and climate cannot be lowered in a manner affecting trade or investment between the Parties*"³. By using such obligatory language, the

¹ Title XI, Part II, Chapter 7, article 7.2: A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.

² https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

Agreement adopts here one of the strictest formulations of non-regression (Article 7.2.2); albeit that this is in the context of trade. In addition to the integration of the non-regression principle, we also welcome the recognition of the shared biosphere, future targets in regards to waste, recycling, water and air pollution ceilings and the full inclusion of the key environment principles ("internationally recognised environmental principles", Article 7.4) as well as the 3 principles of the Aarhus Convention. Finally, the possibility to take unilateral rebalancing measures may be a useful tool for the EU to ensure that the UK respects its environmental obligations. The *"UK may well be constrained in how far it can diverge from EU regulation without risking the loss of benefits under the TCA"*⁴, which is welcome considering the lack of recognition of non-regression in national law at this time.

3. Nevertheless, one important criticism must be stated here. Indeed, only current EU legislation is taken into consideration to calculate this level playing field. This means that *"not the highest level found in any of the Member States will be used"*, only the *"common"* laws to the Member States⁵. The UK will, therefore, have to prove that a Member State law is common, which is likely to be challenging in practical terms. In addition, the level playing field does not mean *"dynamic alignment"* but *"non-regression"*⁶. This means that divergence can still occur between the EU and the UK and the Agreement does not require the UK to make progressive efforts in terms of environmental protection. It does not provide commitments *"to track each other's ambition moving forward except in respect of targets already set"*⁷. Moreover, the article on non-regression, on one hand, reaffirms the right of parties to adopt their own policies and priorities and on the other hand imposes not to weaken or reduce levels of protection. It is, therefore, difficult to assess how strictly this non-regression requirement will be applied and if it is a regulatory non-regression (withdrawal of regulatory measures) or a substantive non-regression (general lowering of environmental protection considering scientific developments, lowering of biodiversity protection etc). Clarification and guidance on proper implementation would thus be beneficial to ensure that greater common understanding can be reached.

4. The fight against climate change is given an essential place within the agreement, which allows for the parties to terminate or suspend all or part of the Agreement in case of any violation of this essential element. It requires each Party to *"respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement"* (Article COMPROV.5: Fight against climate change) and fight against climate change in international fora. To that extent, the Agreement recognises that *"an act or omission which materially defeats the object and purpose of the Paris Agreement shall always be considered as a*

³ https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

⁴ <https://www.traverssmith.com/knowledge/knowledge-container/a-business-friendly-guide-to-the-uk-eu-brexit-trade-deal/>

⁵ <http://eulawanalysis.blogspot.com/2021/01/analysis-5-of-brexit-deal-environment.html>

⁶ <https://ukandeu.ac.uk/the-eu-uk-agreement-is-the-first-to-make-climate-a-make-or-break-issue/>

⁷ <https://www.traverssmith.com/knowledge/knowledge-container/a-business-friendly-guide-to-the-uk-eu-brexit-trade-deal/>

serious and substantial failure for the purposes of this Article" (Article INST.35: Fulfilment of obligations described as essential elements), which will make "it somewhat easier to invoke the provisions when the object and purpose of the Paris Agreement is breached"⁸. The TCA is the first trade Agreement to raise climate change as an essential element alongside with democracy, human rights and the rule of law and non-proliferation of weapons of mass destruction⁹. Additionally, the principle of non-regression is applicable to the provisions on climate change, which means that "*both sides have agreed to ensure that, at minimum, the level of climate protection in place at the end of the transition period shall be guaranteed also in the future*"¹⁰.

5. Nonetheless, the definition of climate level protection adopted in the agreement¹¹ does not reflect the ambitions of 55% reduction adopted by the EU¹² nor the 68% reduction compared to 1990 levels announced by the UK¹³. This also leaves room for discretion for both the EU and the UK with regard to their respective 2030 targets¹⁴.

6. Disputes in relation to the environment and climate provisions are to be governed by the Panel of Experts procedure, "by way of derogation from Title I of Part Six (Dispute settlement and horizontal provisions" (Article 7.7). While the exclusion of environmental and climate provisions from the general mechanism on dispute settlement is questioned, the role of the panel should not be underestimated. It will be vital in practical terms¹⁵.

7. The agreement evidently counts on the establishment of, among others, "*domestic authorities competent to enforce the relevant law with regard to*

⁸ <http://eulawanalysis.blogspot.com/2021/01/analysis-5-of-brexit-deal-environment.html>

⁹ Preamble: "REAFFIRMING their commitment to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements".

¹⁰ https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

¹¹ Article 7.1 (3) : For the purposes of this Chapter, "climate level of protection" means the level of protection with respect to emissions and removals of greenhouse gases and the phase-out of ozone depleting substances. With regard to greenhouse gases, this means:

(a) for the Union, the 40 % economy-wide 2030 target, including the Union's system of carbon pricing; (b) for the United Kingdom, the United Kingdom's economy-wide share of this 2030 target, including the United Kingdom's system of carbon pricing.

¹² https://ec.europa.eu/clima/policies/strategies/2030_en

¹³ <https://www.gov.uk/government/news/uk-sets-ambitious-new-climate-target-ahead-of-un-summit#:~:text=A%20new%20plan%20aims%20for,decade%2C%20compared%20to%201990%20levels.&text=The%20Prime%20Minister%20has%20today,2030%2C%20compared%20to%201990%20levels.>

¹⁴ <http://eulawanalysis.blogspot.com/2021/01/analysis-5-of-brexit-deal-environment.html>

¹⁵ <http://eulawanalysis.blogspot.com/2021/01/analysis-5-of-brexit-deal-environment.html>

environment and climate" (Article 7.5 (1) (a)) to enforce non-regression from levels of protection. **The lack of independent body to enforce non-regression in the field of the environment in the Agreement is justified by the fact that the UK already intends to put in place such body domestically**¹⁶. However, it is concerning that the establishment of such body is still pending at the national level: the much awaited Environment bill will not complete its passage through Parliament until "*at least*" autumn 2021. The delay in the adoption of the bill considerably weakens the non-regression principle and environmental protection commitments in general and raises several issues of legal certainty. In addition, the current body described in the bill does not meet the requirements of independence and also lacks vital enforcement powers. Moreover, there is a clear lack of coordination between the different institutions in the UK (including the Office for Environmental Protection and Environmental Standard Scotland), which can aggravate and risk further intra-UK distortions. **We submit that this hiatus must be given urgent attention by the UK Government and Parliament and that the timetable for these vital elements should be expedited wherever possible.**

8. The UK should introduce short term (as well as, long term) targets to ensure the enforcement of high environmental standards and effective action against pollution. The Environment Bill could be a useful tool to do so, but as it stands today, "*these targets would be long-term, risking leaving efforts to cut pollution in limbo in the interim*"¹⁷. Moreover, we have previously submitted evidence to Parliament about the risks of relying on "targets" alone to realise progressive environmental ambitions. This wider legal and policy contextualisation is still seriously deficient.

9. Finally, to ensure non-regression in the real-world, it is imperative that the UK urgently seize the once in a generation opportunities afforded by the Environment Bill to also take into consideration the interconnectedness between the different elements of the Earth system, including climate change, biodiversity, ocean etc and need for environmental law in the UK to match rapidly advancing understandings in Earth-system science and governance. This must be a priority in relation to the delayed Bill and the TCA viewed as a minimum level of ambition in this regard. Many aspects of the delayed Environment Bill must, therefore, be expedited (in particular also, the awaited policy statement on environmental principles)¹⁸. The limited scope for meaningful public participation however remains also a concern.

10. We would be happy to expand on any of the points raised in this submission should it be of assistance to the Committee in due course.

¹⁶ https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_2532

¹⁷ <https://www.theguardian.com/environment/2021/jan/26/fury-as-long-awaited-uk-environment-bill-is-delayed-for-the-third-time>

¹⁸ <https://greenallianceblog.org.uk/2021/02/04/to-lead-the-world-this-year-on-the-environment-the-uk-must-put-its-own-house-in-order-first/>