

Written evidence submitted by Dr Emily Lydgate (FRE0027)

Below are my responses to your request for written evidence on the Level Playing Field in the Negotiations between the UK and EU, of 21 May. Please note that I have not answered every question and, with the exception of the first question, I have limited my remarks to **environment and climate change** elements of the Level Playing Field.

What, if any, existing level playing field provisions are already included in the Withdrawal Agreement? What, if any, role is there for the Joint Committee to address any such provisions? What, if any, means is there for stakeholders to enforce any such provisions in domestic courts?

It might be useful first to clarify what Level Playing Field (LPF) provisions broadly aim to do, which is to prevent parties of Free Trade Agreements (FTAs) from gaining a competitive advantage through de-regulation and anti-competitive practices. Whilst the EU is most fond of the term LPF, most FTAs negotiated in the last 10 years contain broad-brush, and largely unenforced, commitments toward this goal.

The Withdrawal Agreement (2019) does not contain UK-wide LPF commitments. This is because it focuses on the 'divorce' rather than the future relationship. It also reflects the choice of Johnson's Government to adopt a Northern Ireland-only approach to avoiding checks on the intra-Irish border. Instead, the EU and UK agreed in the Political Declaration that 'robust' LPF commitments would form part of their future relationship (part XIV, para. 77).

Though they are not UK-wide commitments, the Withdrawal Agreement (2019) does provide that EU law will apply in Northern Ireland in a broad range of areas, which include some environmental regulation (Protocol on Ireland/Northern Ireland, Article 5(4), Annex 2) and EU State Aid rules (Protocol Article 10, Annex 5). The latter in particular will throw up a host of interpretative issues for the Joint Committee, which I leave to others to address.

What are the current UK and the EU positions on the level playing field provisions in the negotiations on a Future Relationship? What is your assessment of the level of technical detail the negotiators have grappled with on these provisions to date? To what extent might either position impact either party's future plans to legislate?

Both Parties' positions are notable but for opposite reasons: the UK's proposed FTA language is copy-pasted, the EU's highly innovative.

The UK Government's proposed Environment chapter from its draft FTA for the EU, made available 19 May 2020, is copied almost verbatim from the EU-Canada Comprehensive Economic Partnership Agreement, better known as CETA, except that the UK has eliminated cooperation on fisheries (Article 24.11 of CETA) and all obligations on climate change (Articles 24.9(2) and 24.12(1)(e) of CETA). The UK Government has indicated that it will

address climate change in a separate Energy chapter. However it is unclear why climate change should be confined to an Energy chapter when it is a cross-cutting issue with particular environmental implications.

Given the geographic proximity, issues from air pollution to migratory species are effectively transboundary, and a cut-and-paste approach is insufficient. It also implies that not a great deal of thought has gone into the technical detail. For example, the only thematically specific section, on forestry provisions (Article 28.10, Draft UK Negotiating Document), is likely there simply because it posed no particular problem for the UK Government.

In practice such provisions would have little to no influence on the UK future legislation. The core commitments – not to weaken domestic environmental protections or fail to enforce domestic environmental laws (Article 28.5, Draft UK Negotiating Document) – are difficult to enforce as they require establishing a link between environmental deregulation and trade benefit. Derogation would not be attached to sanctions.

The EU's draft FTA for the UK, of 18 March 2020, departs significantly from LPF provisions in any of its previous trade agreement in three significant ways: 1) substantive climate change provisions; 2) approach to benchmarking standards and 3) enforcement. Area 3) I address below. Regarding climate change, Section 7 of the EU draft requires both Parties to uphold their net-zero targets. It also requires both to have a system of carbon pricing of equivalent scope and effectiveness. This is the first time that such provisions have been included in an EU FTA.

Regarding benchmarking of standards, in contrast to EU FTAs such as CETA and EU-Japan, which commit countries to uphold their own domestic standards, Section 6 of the EU draft requires upholding shared 'common standards' between the UK and EU at the end of the transition period. Unlike proposed State Aid LPF provisions, it does not refer to specific EU legislation, but lists thematically the areas covered. These are broad, if not comprehensive. It also eliminates the requirement to establish a causal link with trade and investment, lessening the emphasis on maintaining fair competition - vis-à-vis environmental protection as a standalone goal.

The EU draft provides that, if both parties raise levels of protection, this will become a new common standard (Article 2.31). This is a rudimentary form of dynamic alignment that might be described as 'dynamic benchmarking'. It contains requirements for both Parties to enforce effectively their own environmental laws, presumed met on the EU side (Article 2.32). Pre-Brexit, the UK relied upon EU bodies for environmental monitoring and enforcement, and this latter requirement reflects the EU's interest in ensuring these functions are replicated.

Clearly more thought has gone into the technical detail than in the UK, but perhaps not enough, as it raises many interpretive questions. Despite the broad net it casts, I would argue that it will likely pose few constraints to UK future legislation because, absent a specific shared legislative framework, the concept of common level of protection is too difficult to interpret and indeed enforce in many cases. The exception would be areas where legislation is based upon achieving quantitative targets, but even there it is not entirely clear

– what if, for example, one Party decided to switch from quantitative emissions limits to tradeable permits? Would this constitute lowering?

In practice, it seems likely that the EU would pursue enforcement only if its competitive interests were clearly at stake. The deregulation concerns about industrial emissions and pollution that motivated these provisions are also most likely to prompt a contentious dispute. In other words, these provisions would not likely function as a broad environmental protection mechanism, and in practice, areas of disagreement are likely to be limited by an implicit causal link with concerns about competitive deregulation. This could be made more explicit, as I recommend below.

How does the EU's position on a level playing field with the UK compare to that which it held in negotiations on CETA with Canada and the EU-Japan FTA?

I address this in my response to the question directly above.

How does the EU's position on dispute settlement in the level playing field compare to the role of dispute resolution in the level playing field provisions in CETA with Canada and the EU-Japan FTA? Have there been any disputes to date concerning the level playing field in either agreement and, if so, how have they been settled and enforced?

Sections 6 and 7 of the EU draft FTA, on environment and climate respectively, are enforceable through the main dispute settlement mechanism outlined in Part 5, Title II, a procedure of consultation, arbitration and finally imposition of fines for non-compliance. Section 8 deals mainly with cooperation on multilateral sustainable development commitments, such as international environmental agreements, and is enforceable through a parallel dispute settlement mechanism, but non-compliance can still be met with fines.

This differs from CETA and EU-Japan, which are enforceable through a parallel dispute settlement mechanism that is not attached to sanctions. There have been no disputes under the environment chapters of either of these FTAs (which most closely approximate the LPF provisions discussed here), nor any comparable EU FTA.

How relevant are geographical proximity and economic interconnectedness to level playing field provisions?

This is an issue on which the UK and EU are profoundly divided, as the UK Government's approach to its future trade policy has downplayed the importance of geography, whilst the EU has utilised it as a justification for a bespoke approach to the LPF.

I am not qualified to comment on gravity models, but the EU remains an important export destination for the UK, which suggests that environmental LPF conditions are important – and not just for the EU. In particular, Covid-19 policies make cooperation on climate even more relevant, as both the UK and EU have called for a 'green recovery' which may include higher or broader carbon taxes to avoid an emissions rebound. It would probably be useful for UK producers if the UK complied with the EU's proposal of requiring a commensurate approach to carbon taxation.

To what extent would agreeing to the EU's position on a level playing field restrict the UK's ability to reach a trade agreement with the US and other third countries? To what extent is the EU restricted by its existing agreements with third countries in what it can offer the UK on a level playing field?

In a third-party FTAs the UK would seek to eliminate substantially all tariffs and possibly harmonise product regulation in some areas, likely dealt with in a Sanitary and Phytosanitary Standards (SPS) or Technical Barriers to Trade (TBT) chapter. Environmental and climate LPF provisions do not restrict the UK's ability to do either of these things, and so the EU's draft with respect to environmental obligations should not impede UK third-party trade agreements.

This is because the EU's proposed environmental LPF provisions do not deal with product regulation, like the areas of SPS and TBT, but rather broader environmental regulation, such as whether UK companies' emissions and effluent are effectively regulated. The EU already requires all goods entering its market to conform to its product regulation, so does not gain from imposing LPF obligations in these areas.

A slight nuance here is that the non-product-based environmental regulation that these LPF provisions encompass may include requirements that impact upon trade between UK and potential third-country FTA partners. Animal welfare requirements in the EU Cosmetics Directive and EU biofuels sustainability criteria are two examples. It is possible to imagine that, eg, the US would successfully demand that the UK had to drop emissions savings or other EU-derived sustainability requirements for US biofuels as part of a US-UK FTA negotiation, which would then lower the UK's protection from 'common' EU-UK levels. I haven't done a survey, but imagine that regulations falling under this category are relatively few.

An issue with the EU's text is that the broad thematic list of areas for upholding common level of protection in the EU's draft text has obscured this distinction between product- and non-product based environmental regulation. In particular, UK negotiators should push for clarity with respect to the inclusion of chemicals, which includes product- and non-product dimensions, and Sanitary and Phytosanitary standards, which are clearly product-related. I make further recommendations about this below.

Where an EU Directive has provided for minimum standards, has the UK tended to go for the minimum or to choose to set higher standards on the areas covered by the level playing field? How does the UK's record on compliance to EU rules compare to EU Member States on the areas covered by the level playing field? What is your assessment of the level of trust on each side that either will maintain or enhance their standards and compliance in future?

The UK has a perhaps unique distinction of being viewed both as the dirty man of Europe and also an EU environmental, and in particular climate, leader. The picture is complex, and I believe both sides of the Channel are watching the current Government's handling of this negotiation for signals about the UK's future environmental direction. The UK has often faced environmental infringement proceedings from the CJEU; an Institute for Government

survey reveals the UK is 'less well-behaved' when it comes to environment than any other area of EU law (*Who's Afraid of the ECJ*, 2017, p 18). None of this is good for EU trust and helps explain its position.

It's also unclear whether the UK meets draft EU treaty requirements on environmental enforcement. It specifies that an independent body 'shall have the right to bring a legal action...with a view to seeking an adequate remedy (Article 2.32 LPFS)'. The UK's proposed independent body, the Office of Environmental Protection (OEP), is unable to make binding recommendations, even if a UK public body has seriously failed to enforce environmental law; there can be judicial review but this does not encompass fines (Draft Environment Bill, Sections 26-34). In contrast, the EU Commission is required to ensure enforcement of EU rules and can ultimately fine Member States.

Could you sketch out a possible compromise on the level playing field provisions and how it might be achieved? Would it be possible for such an outcome to not involve the CJEU?

Given their shared commitment to environmental protection and net-zero emissions by 2050, it should not be difficult to find a compromise between EU and UK approaches to the LPF for climate and environment.

On the UK side, concerns about EU draft FTA provisions on environment and climate are overblown. They do not seem to imply any role for the CJEU, as the UK is not required to apply any specific EU legislation, so this UK requirement can be presumed met, though the UK should clarify this as the role of EU law is somewhat ambiguous. If the EU implicitly accepts the UK's OEP as meeting its environmental enforcement requirements, this indicates from the off that it is adopting a very light touch approach. Further, as argued above, in practice these provisions should impose few constraints on UK future legislation and the UK Government should be reminded that it has committed to high levels of environmental protection domestically so none of this should pose a problem anyway. Note for example that the same environmental principles that the EU lists in Section 6 of its draft FTA, including the precautionary principle, are also listed in the draft UK Environment Bill. Also, cooperating with the EU on an ambitious approach to carbon pricing (Section 7) is useful for UK competitiveness, and shared benchmarking should be embraced in this area.

The EU should clarify that Section 6 applies only to non-product regulation, in particular in the area of chemicals. It should drop altogether the inclusion of a non-regression requirement on SPS regulation as it makes little sense to impose constraints on UK product-related regulation. SPS matters are dealt with in a separate chapter, and any goods exported from the UK to the EU will have to comply with EU SPS provisions anyway.

The EU should also recognise that upholding 'common standards' is very tricky to interpret and enforce and be open to pursuing a simpler approach in this area. One possibility would be to follow more closely the approach taken in the November 2018 rejected Withdrawal Agreement and negotiate shared quantitative limits in a small range of areas, ie marine fuels, atmospheric pollutions and industrial emissions. Unlike in that Agreement, non-compliance could be tied to sanctions for derogation in these areas, as well as for failing to enforce domestic environmental laws.

What international commitments do the UK and the EU have on the areas covered by the negotiations on a level playing field? If an agreement is not reached before the end of the Transition Period, what would be the WTO and international legal baseline as regards the policy areas being negotiated on a level playing field?

The WTO provides fora for environment and trade cooperation through ongoing negotiations in the Committee on Trade and Environment as well as plurilateral Environmental Goods Agreement negotiations, though both are currently stalled. WTO Agreements provide the 'baseline' that countries have the right to regulate to achieve the level of environmental protection they wish, as long as doing so doesn't prevent them from upholding their obligations under the WTO.

FTA obligations, including those proposed by both the UK and EU, go further than the WTO or International Environmental Agreements by requiring cooperation between the Parties to the FTA on specifically-identified environmental issues of mutual importance, and establishing fora and specialised Committees to achieve this cooperation. Both proposals also provide Parties with enhanced abilities to surveil, and challenge, each other's domestic environmental enforcement. Relying on international agreements would eliminate the potentially valuable opportunity for deeper cooperation in these areas.

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Committee on the Future Relationship with the European Union

House of Commons, London, SW1A 0AA

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21 May 2020

Dr Emily Lydgate
Senior Lecturer in Law
University of Sussex

Dear Dr Lydgate,

The House of Commons Committee on the Future Relationship with the European Union is inquiring into the progress of the negotiations between the UK and the EU. Under normal circumstances, the Committee holds regular oral evidence sessions in Westminster. However, measures to prevent the spread of the coronavirus make this difficult.

The Committee is keen to gather as much evidence as possible to inform its deliberations so I am writing to you to ask whether you would be willing to help us with our work by making a written submission. We welcome general responses to our call for evidence, which was published on 4 March. We also hope that you would be willing to answer some of the more specific questions set out below on issues that fall within your area of expertise. Submissions need not address every bullet point and can include other matters that you think are relevant to the negotiations and should be drawn to the attention of the Committee.

In the questions below, we take the level playing field provisions to include state aid, competition, social and employment standards, environment, climate change, and relevant tax matters, as set out in the Political Declaration. We welcome contributions that address one, some or all of these areas and in your submission you can choose to group them together as level playing field provisions or to break out issues where you feel it is important to draw the Committee's attention to them. Please do not feel you need to address all of these policy areas.

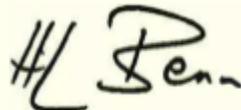
- What, if any, existing level playing field provisions are already included in the Withdrawal Agreement? What, if any, role is there for the Joint Committee to address any such provisions? What, if any, means is there for stakeholders to enforce any such provisions in domestic courts?
- What are the current UK and the EU positions on the level playing field provisions in the negotiations on a Future Relationship? What is your assessment of the level of technical detail the negotiators have grappled with on these provisions to date? To what extent might either position impact either party's future plans to legislate?
- How does the EU's position on a level playing field with the UK compare to that which it held in negotiations on CETA with Canada and the EU-Japan FTA?
- How does the EU's position on dispute settlement in the level playing field compare to the role of dispute resolution in the level playing field provisions in CETA with Canada and the EU-Japan FTA? Have there been any disputes to date concerning the level playing field in either agreement and, if so, how have they been settled and enforced?
- How relevant are geographical proximity and economic interconnectedness to level playing field provisions?
- To what extent would agreeing to the EU's position on a level playing field restrict the UK's ability to reach a trade agreement with the US and other third countries? To what extent is the

EU restricted by its existing agreements with third countries in what it can offer the UK on a level playing field?

- Where an EU Directive has provided for minimum standards, has the UK tended to go for the minimum or to choose to set higher standards on the areas covered by the level playing field? How does the UK's record on compliance to EU rules compare to EU Member States on the areas covered by the level playing field? What is your assessment of the level of trust on each side that either will maintain or enhance their standards and compliance in future?
- How confident are you that it is possible to conduct negotiations on something as technical as the level playing field by videoconference? Given COVID-19 has the potential to fundamentally change some aspects of the economy and the way people live and work, is there a case for looking again at what the two sides are trying to negotiate? Is there a danger that the current negotiating aims and mandate will lead us to an outcome on the level playing field that is not fit for purpose in a post-pandemic economy?
- Could you sketch out a possible compromise on the level playing field provisions and how it might be achieved? Would it be possible for such an outcome to not involve the CJEU? How united are EU Member States and the European Parliament in what the EU can offer the UK in the negotiations on the level playing field? To what extent might treating the areas of the level playing field separately help or hinder a compromise?
- What international commitments do the UK and the EU have on the areas covered by the negotiations on a level playing field? If an agreement is not reached before the end of the Transition Period, what would be the WTO and international legal baseline as regards the policy areas being negotiated on a level playing field?

The Committee staff will be happy to discuss the inquiry, any issues raised, or the process for submitting written evidence. You can contact them at freucom@parliament.uk.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hilary Benn', written in a cursive style.

Hilary Benn
Chair of the Committee