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What is at stake?

1. Why are the negotiations on environment and the level playing field important to you/your members?

Brexit&Environment is a network of experts that seeks to offer impartial insights on the implications of Brexit for EU and UK environmental policy and governance, drawing mainly on the findings of peer reviewed academic research. Since 2015, we have worked with a wide variety of organisations including parliamentary committees, government departments and environmental NGOs, at EU level, at UK level and in the four nations of the UK.

The negotiations on the level playing field (LPF) concern us and the organisations that work with us because they are directly relevant to the scope and long-term effectiveness of existing environmental policy measures. They are widely perceived to be a make-or-break issue in EU-UK discussions; if the two sides fail to bridge their differences there is a significant risk of a 'no trade deal' outcome, with all the associated threats to existing policy protections and to the wider green economy.

However, it is important to remember that even if the UK and EU manage to square their differences and strike a new trading agreement, the debate about LPFs and non-regression will not disappear. In fact, it is very likely to bubble up and become a source of friction in other settings, such as trade with non-EU partners and amongst the devolved nations of the UK. This inquiry is therefore important and very timely.

1a What should the environment and climate parts of the future relationship deliver?

The EU is sensitive about the LPF because its Single Market arguably represents one of the most complete examples of an environmental LPF anywhere in the world (Jordan et al. 2020). The main purpose of common (or 'level') standards in trade discussions is to prevent environmental regression and thus unfair competition. In principle, a level playing field can be threatened by one side raising its existing standards (environmental progression) or reducing them (environmental regression).

In practice (and certainly within EU-UK negotiations), policy regression is perceived to pose a more serious threat than policy progression. The Lisbon Treaty holds that EU policy should aim for a high level of environmental quality, which in effect is a general commitment to policy progression. Individual member states may set higher standards than the EU minimum if they wish (i.e. engage in 'environmental progression'), subject of course to some limitations.

At present, the EU and the UK appear to disagree on a lot. They do not even employ the same terminology. The EU constantly refers to 'the (existing) level playing field' as though it was somehow sacrosanct; the UK pointedly refers only to 'open and fair competition'. Section XIV of the 2019 Political Declaration sought to bridge these differences by referring to the "Level Playing Field for Open and Fair Competition".

On specific matters of detail, there are also appreciable differences:

- The EU wants detailed, binding and enforceable commitments to the *current LPF and non-regression* inserted into the text of the final agreement. The UK has stated that it

does not intend to regress – although without using the terms non-regression and the LPF – but it has not made any legal commitment to that effect.
- The EU has underlined the importance of *maintaining policy progression;* it has even proposed that both sides formally commit to progress. Again, the UK has made no formal, mutually enforceable commitment to that effect.
- *The structure of the final agreement*: the EU would like a single all-encompassing agreement with a common dispute resolution system, whereas the UK is pushing for a suite of standalone agreements on a set of specific issues (including fisheries and energy) with a simple trade agreement at its core. The EU regards an association agreement as the best type of agreement to aim for.

2. What are the EU's justifications in pushing for the environment and climate LPF provisions, and how sound are these?

The EU has been the most vocal in expressing fears about policy regression. It is determined that the UK should sign up to non-regression rules and institutional procedures which are analogous to the ones that prevailed when it was a member state. Its reasoning is clearly laid out in the Political Declaration:

- "Given the Union and the UK's geographic proximity and economic interdependence, the future relationship must ensure open and fair competition, ensuring robust commitments to ensure a level playing field".
- "The precise nature of the commitments should be commensurate with the scope and depth of the future relationship and the economic interconnectedness of the Parties".

Michel Barnier has repeatedly explained that there is a clear trade-off between market access and regulatory alignment: the more level the playing field, the deeper and more open the trading relationship and *vice versa*.

For the EU, the rationale for common environmental rules has always been twofold: (1) environmental – i.e. protecting nature for its own sake; and (2) economic – avoiding a regulatory race to the bottom (and thus unfair competition). In the main, the second of these two has been more influential over the lifetime of EU environmental policy. In part because of pressure from the UK, the EU has developed a series of internal procedures to ensure that new and existing policies maintain the existing LPF i.e. are proportionate, cost effective and strike a balance between national and EU control (subsidiarity).

3. What is the thinking behind the UK's approach and proposals, and how viable are these?

The UK has mainly relied upon recycling extracts from existing EU trade agreements (e.g. CETA). Above all, the UK wishes to assert its regulatory autonomy post-Brexit. The draft text of the 'Comprehensive Free Trade Agreement' that it hopes to strike thus recognises 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" (Article 28.3).

Costs and benefits

4. In which policy areas does the UK stand to lose flexibility by signing up to the EU's proposals, and what benefits could be brought by maintaining flexibility?

The big – and as yet unanswered – question is what does the UK intend to do with the extra autonomy that it is demanding in the negotiations? Ministers have repeatedly stated that they do not intend to use it to regress existing UK standards – although without actually using that term or the term level playing field. Article 28.5 of the UK's draft text makes an unspecific reference to non-regression; the draft text does not

contain an explicit commitment to maintain the principle of policy progression which is arguably hardwired into the Lisbon Treaty. If the UK is honest about not intending to regress, then arguably it has little to lose from signing up to the EU's proposals (and by implication the EU has little to lose from dropping its insistence on legal guarantees. At present, a lot hinges on whether the two sides really trust one another. The EU's repeated insistence on legal guarantees and enforceable standards suggest that it does not entirely trust the UK to honour its commitments (see Q.11)

4a. What effect would LPF commitments in a UK-EU agreement have on the UK's ability to do other trade deals, or the shape of those?

The UK is currently negotiating two types of trade agreement: those where there is already an agreement with the EU-28 in place and those where there is not. For the first type, the pre-existing environmental protections are likely to be 'rolled' over. The risk of significant divergences with the LPF commitments in the EU-UK agreement is therefore likely to be lower for such agreements.

More problematic are the second type (the ones with the US and Australia for example), as the UK will arguably be starting with a blanker canvas and thus will, in theory, enjoy greater autonomy to depart from prevailing EU policy norms. *It is useful to think of this as constituting another playing field with other partners, but with the huge difficulty that it may be set at a different level than the EU-UK one* (see Q.12).

Be that as it may, Ministers are unlikely to enjoy complete autonomy in setting the level of any playing field given the acute political sensitivity of environmental and agriculture issues in recent free trade negotiations (recall the tortured battle to negotiate and/or ratify TTIP, CETA and the Mercosur deals), and the potential interactions with UK devolution (see Q.11a).

5. Are there policy areas where the UK should be demanding LPF provisions, to ensure that the EU maintains its environmental standards?

There is arguably one area in which the UK is moving further and faster than the EU: decarbonisation. The EU is in the midst of an internal discussion on its European Green Deal, with a new Climate Law as one of its centrepieces. While some EU countries have not yet bought fully into the long-term aim of net zero (in some countries emissions are still rising), others want to move faster and also fear being undercut by external trade partners (hence discussion of a carbon border adjustment tariff). These make decarbonisation an obvious area in which common LPF provisions would align with long-term UK interests. It is rather curious, therefore, that the UK appears to be resisting the EU's attempts embed international climate commitments in the core of the trade deal (Brunsden, 2020).

6. What could be secured or lost in the free trade agreement because of what is agreed on the environment LPF?

The EU is adamant that the more level the playing field with the UK, the deeper and more open the trading relationship will be and *vice versa*. Michel Barnier maintains that the UK will lose preferential access to the Single Market if it does not sign up to robust and dynamic (Jordan 2019) LPF provisions. Such provisions will not of course prevent the UK from engaging in policy progression (and may arguably make it easier, by reducing the risk of being undercut by firms located in the EU) (see Q.5).

UK Ministers believe that less constraining LPF provisions will give the UK greater flexibility to address environmental problems within the UK. Given that Ministers have ruled out engaging in policy regression, in practice any benefits can only arise from

achieving similar (or higher) standards in a slightly different way. *In other words, in practice the debate about the LPF partly boils down to something quite specific: potentially quite small differences in the means – not the ultimate ends – of environmental policy*.

6a What would be the impact of no agreement in this area?
It is important to differentiate between 'no [withdrawal] deal' risks and 'no [new trade] deal' risks.

The main 'no [withdrawal] deal' risks to domestic policy are being addressed by the UK government through the adoption of new laws (the Environment Bill, agriculture and fisheries laws, and the conversion of existing EU protections into 'EU retained law') and institutions (specifically the OEP). *If these preparations are not completed before the end of the current transition (i.e. 1 January 2021), a significant post-Brexit environmental policy and governance gap will open up, regardless of whether a new trade deal is struck with the EU*. This is why Greener-UK is demanding that these and other laws are fully on the statute book by 31 December 2020.

However, there are many additional things that UK policy makers can do right now to limit policy and governance regression that are 'Brexit-neutral' i.e. not reliant on striking a new trade deal with the EU (see Q.13).

Civil society participation

7. Do the UK and EU proposals provide appropriate routes for civil society and the private sector to raise concerns about the implementation of the agreement?

Currently, any citizen of the EU can write to the European Commission to alert it to instances of poor implementation in any one of the Member States. Both proposals appear to provide routes for non-state actors to raise concerns about the implementation of the agreement in their respective jurisdictions (although note the EU's attempt to bind the UK into Aarhus Convention rights - see Q8). Where they differ is in relation to issues of governance – namely enforcement and dispute resolution (see Q.11).

Non-regression

8. Both the EU and UK have included clauses on upholding levels of environmental protection, what are the implications of the different approaches?

Modern trade agreements contain specific legal provisions that seek to uphold environmental standards, maintain a LPF and thus facilitate fair and open competition. These are commonly known as non-regression clauses. *In practice, such clauses (and indeed international environmental laws in general) are not that strictly enforced and consequently are widely perceived to have provided rather limited protection.* These weaknesses explain why the EU does not rely on non-regression clauses to maintain a LPF within its own borders. Instead, it has established much stronger mechanisms, backed up by targeted enforcement powers including the threat of fines in the most extreme cases. To an extent, it now wishes to bind the UK to similar mechanisms post-Brexit.

The EU's draft text is directly informed by over 40 years of joint policy making with the UK. It expects both parties commit to:

- *non-regression in a specific list of ten areas of environmental policy* (LPFS 2.30). Standard non-regression clauses are not this specific. For instance, they include relatively 'localised' issues such as access to information and justice, EIA and nature protection. Moreover, the EU's regression clause is pegged to standards that are in force "at the end of the transition period" and, importantly, also includes "those targets

whose attainment is envisaged for a date that is *subsequent to the end of the transition period*" (our emphasis added).

- *policy progression to ensure higher levels of protection in the future*. This is modelled on Article 16.2 of the EU-Japan FTA, which states that parties should "strive to continue to improve [their] laws and regulations and their underlying levels of protection" (our emphasis added). Moreover, any new standards that result from policy progression should themselves not regress (LPFS 2.31 (1)). This clause should be likened to an environmental policy 'ratchet'.
- a *weak form of dynamic alignment* **-** one that has to be mutually agreed on a case-by-case basis via a new body, the Partnership Council (LPFS 2.31 (3)).
- *operating their own rigorous monitoring and enforcement systems* (LPFS 2.31 (1)). An "independent body" (or bodies) in each Party should ensure the effective monitoring of the provisions covering non-regression and progression (noted above). The body (or bodies) in the UK should also collaborate with the EU Commission, and vice versa (LPFS 2.33 (1)).

By contrast, the UK's draft text makes much less specific references to the non-regression of existing standards (Article 28.5) and policy progression (Article 28.3), and avoids any reference to regulatory alignment (dynamic or otherwise) or to regulatory cooperation with EU institutions.

8a How would the EU and UK's different approaches to non-regression affect UK policy-making?

Even if the UK and EU manage to square their current differences, the debate about LPFs and non-regression is destined to continue, both in relation to trade negotiations with countries outside Europe, and concerning trade amongst the four nations of the UK.

The devolution dimension deserves more public attention because post-Brexit (and absent new UK-wide common frameworks), the four nations will enjoy new opportunities to pursue independent policies that could disrupt the internal LPF within the UK. One obvious and immediate point of difference relates to governance and enforcement, where the four nations are currently moving at different speeds (see Q.11a) and in different directions.

8b What happens if a party lowers their standards or level of protection under each approach?

Assuming that both parties intend either to maintain or progress their existing standards (i.e. not regress), then the most significant differences between the two draft texts would appear to concern matters of enforcement and dispute resolution (which would apply if one party suspected the other of regressing its standards – see Q.11).

9. Must the agreement refer to the common standards that apply in the EU and UK at the end of the transition period to be acceptable to the EU, or could it refer to other standards in some areas, for instance those in international environmental and climate agreements?

No, it is not strictly necessary to refer to EU standards . We suspect that the EU has inserted this wording because it fears being undercut by the UK as it embarks on a period of significant and sustained policy expansion (namely the European Green Deal). It refers to EU standards rather than international standards because the former are normally more precisely worded, more stringent in their ambition and more heavily enforced (at least in the EU) than the latter (see Q.8).

9c Would a reference to common standards in the EU and UK at the end of the transition period bring in the Court of Justice of the European Union (CJEU)?

The EU is likely to insist that it should bring the CJEU. The EU has repeatedly asserted its own regularly autonomy in the talks – i.e. that the CJEU should be the sole arbiter in disputes over the application of EU law. The UK has been equally adamant that there should be no role for the CJEU (see draft negotiating mandate, published February 2020, page 17), even though the Withdrawal Agreement grants it a role in relation to policy specifically within Northern Ireland. These reasons probably explain why the EU prefers a single, integrated agreement in which issue specific disputes can be brought together and resolved in a holistic manner.

Environmental principles

10. If the environmental principles are included in a UK-EU agreement, what difference would that make to policy-making and the decisions of courts in the UK?

At present, there is not a significant difference between the two sides in relation to how they refer to the policy principles. The EU's draft text expects both sides to apply and respect a number of them (precaution, prevention, polluter pays and the rectification of environmental damage at source) which are contained in the Lisbon Treaty (LPFS 2.30 (4)) and thus frame all EU policy making.

The UK's draft text does not explicitly reference these four principles. However, precaution is alluded to but not explicitly referenced ("where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Article 28.8)).

The Environment Bill will eventually establish a requirement for UK Ministers to have 'due regard' to a more detailed policy statement containing a longer list of environmental principles. Although this statement will frame environmental policy-making post-Brexit, it will also extend to other (but not all) areas of policy making and therefore will broadly perform the same function as the Lisbon Treaty. When the Bill is enacted, the OEP will have the power to report to Parliament on the application of the policy statement. In June 2020, the Scottish Government published the UK Withdrawal from the European Union (Continuity) (Scotland) Bill; it also references the same four principles as the Lisbon Treaty (Reid, 2020); a wider range of bodies should also have regard to the principles directly (i.e. not just to a policy statement), taking heed of the CJEU's evolving interpretation of them (an example of how Scotland is pursuing a dynamic alignment approach, post-Brexit).

Enforcement and dispute resolution

11. What shape should the relevant enforcement and dispute resolution mechanisms take to be both negotiable and to help ensure that the agreement can be maintained in the long-term?

The two sides are probably most sharply divided on the question of how the LPF will be governed. The EU is keen – to quote the Political Declaration – to adopt an enforcement and dispute resolution system that is more "robust" than a standard free trade agreement (e.g. CETA). In its negotiating mandate it stated that the EU-UK agreement should have "robust, efficient and effective" systems to govern its operation (Article 149), including the ability to suspend parts of the agreement and request financial compensation for any resulting damage (Article 161). In its draft negotiating text it suggested (LPFS 2.32) that each party should operate its own rigorous enforcement systems (LPFS 2.31 (1)). The "independent body" (or bodies) in each Party should ensure the effective monitoring of the provisions covering non-regression and progression (noted above). The body (or bodies) that operate in the UK should also collaborate with the EU Commission, and vice versa (LPFS 2.33 (1)).

By contrast, the UK's draft text again stresses the UK's autonomy: a specific Committee on Trade and Sustainable Development should be established to oversee the environmental provisions of the Treaty (Article 28.12). A Panel of Experts can be formed to resolve any disputes that arise (Article 28.14), but without any significant power to enforce its decisions. Crucially, Article 28 ('Trade and Environment') will not be subject to the Agreement's overarching (and more powerful) dispute resolution mechanisms.

11.a Does the Office for Environmental Protection (OEP) meet the criteria of the 'independent body' required under the EU's proposal?

The UK has already moved to address some of the EU's concerns (initially it denied the existence of an environmental governance gap, but eventually conceded the need for a new body – the OEP). The OEP would appear to meet the criteria of the 'independent body' mentioned in the EU's proposal, although its board and budget are still decided by Ministers. Moreover, it currently applies only to England, with a provision in the Bill for its remit to be eventually extended to Northern Ireland (see the Legislative Consent Motion passed in the NI Assembly on 29 June 2020).

When it was published in June 2020, the UK Withdrawal from the European Union (Continuity) (Scotland) Bill proposed to establish a similar body in Scotland – Environmental Standards Scotland – with similar powers to the OEP (Reid, 2020). The Welsh Government has consulted on environmental principles and governance post-Brexit, but has not yet published its response.

Trade deals with the rest of the world

12. What effect would LPF commitments in a UK-EU agreement have on the UK's ability to do other trade deals, or the shape of those?

The UK is determined to express its sovereign right to regulate in an autonomous manner within the UK. However, modern trade negotiations take place in a goldfish bowl. As the UK negotiates with the EU on LPF-related issues, potential new trading partners outside Europe will be watching closely and re-calibrating their expectations accordingly. *When negotiations begin with countries that have lower environmental standards than the UK, the starting positions are likely to be reversed – with the UK voicing fears about being undercut and insisting on a LPF set at a high level*.

The UK has embarked upon a journey towards a much more diverse, multi-levelled system of environmental governance in which there is no longer a single EU-UK level playing field that the EU negotiates with other trading blocs, but multiple, intersecting playing fields (international, European, and within the UK). *The UK Government should give thought to how consistent it wishes to be in operating within and across these rather different but interconnecting levels and playing fields*.

Reaching an agreement

13. Are there helpful precedents or creative proposals that the negotiators should be considering in the main areas of contention?

The UK's stance reflects a strong belief within Government that a philosophy of 'sovereign equals' should prevail. At the end of the transition period, UK policy makers will finally enjoy the regulatory autonomy that was promised during the referendum campaign. There are, however, a number of non-regression strategies that the UK can implement right now, that would underpin the current environmental LPF with the EU without comprising at all on its new autonomy. For example, it could:

- *Adopt strong, enforceable non-regression clauses* in laws across the UK (such as the Environment Bill) and/or insert similar clauses in the trade agreements that the UK strikes with other trading partners, all underpinned by strong intra-UK common frameworks.

- *Adopt equally strong policy progression clauses* in law across the UK and/or insert the same clauses in the trade agreements that it strikes with other trading partners, again underpinned by strong intra-UK common frameworks.
- *Commit to public reporting on regression and progression*: currently, the Environment Bill requires the Government to issue a statement to Parliament alongside any proposals for new items of environmental legislation that demonstrates that it will "not have the effect of reducing the level of environmental protection provided for by any existing environmental law". The Bill could easily be amended to: a. cover *all* new policies that may conceivably affect the environment (rather than just those overseen by DEFRA); b. encompass changes to all existing laws including those retained from the EU; c. ensure the statement is an oral one so that parliamentarians have an opportunity to hold the minister to account. Similar reporting commitments could be discussed amongst all four UK nations to promote greater internal coordination.
- *Ensure that existing policies (including all those retained from the UK's EU membership) are actively updated over time, through open and inclusive processes of consultation*; where relevant, it could insert binding 'review and revision' clauses into all existing and new policies (Jordan and Moore, 2020).
- *Create a comprehensive, evidence-informed system to ensure that existing environmental policies are regularly evaluated and updated over time:* if this were analogous to the EU's system of 'Fitness Checking' overseen by the European Commission, it may address some of the trust issues noted above.
- *Ensure a LPF within the UK via agreed common frameworks*, incorporating strong, enforceable clauses on non-regression and with commitments to policy progression. From all three devolved perspectives, level playing fields imposed by Westminster that affect devolved matters (such as the environment), i.e. making English policy common policy 'by default', are unlikely to be acceptable.
- *Commit to sharing information on environmental trends and processes with other trading partners to inform a high-trust debate about when and where to engage in policy progression*; the simplest way to achieve this in relation to EU trade would be for the UK to seek associate membership of the Europe's premier data collection body, the European Environment Agency.
- *Engage in some strategic, long-term thinking on how LPF issues are likely play out across the more multi-levelled environmental governance system that will emerge in the next 10-20 years.* The UK is moving rapidly towards a system in which there will be not a single playing field (singular), but multiple, interlocking playing field*s* (plural) (see Q.12). In the past, such a topic would have benefited from the deep analytical knowledge of the standing Royal Commission on Environmental Pollution.

Crucially, these non-regression strategies are 'Brexit-neutral' – i.e. they do not depend on the specific nature of the future relationship negotiated with the EU. They can even be implemented domestically in a 'no trade deal' scenario in which the EU and the UK decide to trade on WTO terms.

14. Where do you see the landing zone between the UK and EU's positions?

At present, *the two sides disagree on a lot; they do not even employ the same terminology*. The EU has been consistent in its demands to maintain the current LPF. It wants detailed, binding and enforceable commitments to the current level playing field and non-regression inserted into the final agreement. The UK has repeatedly stated that it does not intend to regress but has not been prepared to make any legal commitment to that effect. The EU is determined to engage in policy progression*;* it proposes that both sides formally commit to progress. The UK has made no formal, mutually enforceable commitment to that effect.

Nevertheless, *there is undeniably scope for a deal to be done because, first of all, neither side has publicly stated that it wishes to regress*; the argument is mainly over the EU's wish for legal guarantees to secure what is at present a shared political ambition. There is ample scope to discuss how binding these guarantees could or should eventually be.

Second, *there is also scope for a potentially productive debate on policy means* i.e. how to achieve similar standards via different routes. The EU would feel much more comfortable if this were underpinned by formal systems of collaboration (e.g. LPFS 2.33 (1)) and/or associate membership of the European Environment Agency.

Finally, *neither side wants to maintain the existing, very direct form of dynamic alignment to continue (akin to EU membership) in which both sides move in lockstep*. This opens up space to discuss the EU's proposal for less dynamic forms of alignment (see above). In fact, at least one part of the UK - Scotland – has already taken a decision to align dynamically with the EU regardless of the eventual outcome of the EU-UK negotiations (Reid, 2020).

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