

Initial environmental analysis of the EU-UK Trade and Cooperation Agreement

29 December 2020

We are far more likely to tackle the climate and nature crises if we can and do cooperate with our neighbours. Therefore it is a relief that a future relationship agreement has now been reached between the UK and EU. In this, both parties 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 agreement is light on mechanisms to promote shared ambition or joint environmental action, and leaves much for both sides to do to establish new ways of working together.

This is an initial assessment of how the EU-UK Trade and Cooperation Agreement addresses the environment. We will continue to analyse the provisions over the coming days.

Overall structure

This is a relatively 'thin' agreement and many areas, especially energy (Part Two Title VIII), will require substantive further negotiation to fully operationalise the provisions. The deal also provides a mechanism whereby all future bi-lateral 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.

Non-regression

To tackle the environmental crisis, an enforceable non-regression mechanism that is broad in scope and applies irrespective of its possible impacts on trade or investment should be a basic prerequisite of all trade agreements. This would prevent both parties from weakening standards and give confidence to investors in the future.

Unfortunately, the approach to non-regression in the agreement only seeks to uphold 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). This trade and investment test is notoriously difficult to prove and has been ineffective in previous trade agreements where it has been used, creating doubt about whether it can be a barrier to lower standards in the future.

Whilst it is welcome that the non-regression provision does offer some machinery for enforcement – with specific opportunities for arbitration and temporary remedies (see below) – the value of this is limited by the narrowness of the provision. Providing proof of damaging economic impacts on the other party will be difficult and potentially a very protracted undertaking.

Rebalancing measures

Article 9.4 sets out a rebalancing process to allow parties to implement countervailing measures where significant future divergence in environmental and labour standards by one side can be shown to materially impact on trade or investment in a negative way. 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 helps 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. This is helpful if it is effective as much greater ambition will be needed over the next decade and beyond.

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 the possibility of a 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

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 agreement and contained in Title 1 does not apply to the environment chapter (chapter seven) nor to the trade and sustainable development chapter (chapter eight). Instead, the agreement provides for a weaker mechanism involving consultations between the parties and the convening of a panel of experts.

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 provide some additional potential for action by requiring parties to discuss measures to be taken and providing a role for the Specialised Committee in Level Playing Field. 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 which does not impact on trade.

However, 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 appears to 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 and investment.

There are also useful clauses regarding domestic monitoring and enforcement. Article 7.5 requires each party to ensure competent domestic enforcement authorities and national administrative or judicial proceedings are available 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. Together, these activities would provide for a good level of environmental governance. However, while the language of these provisions is binding, they are not enforceable.

Climate change

The fight against climate change is explicitly specified in Article COMPROV.12 as constituting an 'essential element' of the agreement. Furthermore, 'materially defeating the object and purpose of the Paris Agreement' is explicitly specified in Article INST 35 as constituting a serious and substantial failure to fulfil an essential element of this agreement. This is a very welcome provision, and means any serious breach can lead to the suspension or termination of all or parts of the agreement. However, we note that the

threshold of demonstrating that a party has defeated the object and purpose of the agreement may be a high threshold to meet.

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, as chapter eight is not subject to the horizontal dispute settlement mechanism, these provisions are likely to have limited effect.

Carbon pricing

Each party is required to have 'in place an effective system of carbon pricing as of 1 January 2021' (7.3.1), which should cover aviation by the end of 2023. The agreement also commits the parties to 'give serious consideration to linking their respective carbon pricing systems' (7.3.6), which we urge them to do given it will produce a more effective scheme.

Energy

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 to measure progress (Article ENER.21).

Civil society participation

The agreement explicitly recognises the importance of civil society participation in its implementation (Article INST.6). Greener UK welcomes the proposed creation of a "Civil Society Forum" and will actively engage with all parties to ensure its effective operation.

However, we note that 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. 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.

In addition, the failure to expressly include measures designed to ensure access to environmental information, public participation and access to justice in environmental matters; and environmental impact and strategic environmental assessment within the scope of the non-regression provision is disappointing.

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