Environmental standards are being discussed in the EU-UK trade negotiations under the banner of the economic partnership and in particular the arrangements for a level playing field.

Future relationship negotiations

Level playing field

The EU fears that the UK could gain a competitive advantage by lowering UK environmental standards, and hence lowering the cost of regulatory compliance for UK exporters. To address this concern, paragraph 77 of the Political Declaration included a commitment for both sides to maintain their environmental standards at the high levels provided by the common standards in place at the end of the transition period. Maintaining standards is, however, not necessarily the same as either:

(i) keeping the precise environmental regulations currently on the UK statute book frozen in time (which would not allow for technological changes or new scientific knowledge); or
(ii) committing to amend existing regulations in step with the EU - "dynamic alignment".

It also does imply not weakening regulation – the concept of “non-regression”.

“Standards” is a particularly ambiguous term at the best of times, and whilst there might be a prescriptive set of limits and thresholds in some areas that have been written in to EU environmental law, in many other areas the requirements of the Directives and Regulations are more outcomes based. It is probably wider than regulations written into legislation though and could include:

- environmental policy instruments, possibly
- written guidance produced by domestic environmental regulators, probably
- the manner in which regulators enforce in practice, possibly

Around 80-90% of UK environmental law derives from the EU and around 25% of all EU legislation is estimated to concern environmental protection. Membership of the EU undoubtedly drove improvements in environmental standards in the UK and cross-EU regulation established a level playing field for environmental protection amongst competitors in the EU market that was welcomed in some sectors. Cross-EU regulation has also been an enabler of the EU clean technology and environmental services industries.
• the judgments of European and domestic courts interpreting environmental regulation, most likely.

Nevertheless, a change to existing regulations in one particular aspect may or may not affect the level of overall protection in that area; it may be compensated for by more stringent requirements elsewhere. An holistic approach may be necessary, begging the question how trade-offs between protecting one aspect of the environment at the expense of another will be dealt with.

Hence, there is considerable room for disagreement between the EU and UK negotiators on what maintaining high standards will actually entail. To be at all workable, it will require a more precise definition and for there to be a sensible mechanism to settle later difficulties in applying the definition in practice.

The UK Government’s negotiating position

The Government, mindful of the need to demonstrate to the British public that it has “taken back control” as promised, makes a clear upfront statement in its UK negotiating mandate that the UK will not accept dynamic alignment of UK laws or for there to be any jurisdiction in the UK for the EU institutions including the Court of Justice of the EU (“CJEU”). The mandate then adopts very much the framework of a negotiation between two separate WTO members, which rather artificially ignores the current entwined body of EU-UK law (environmental or any other) and talks instead about:

(a) the need to address regulatory barriers to trade (which could be environmental), whilst preserving each side’s right to regulate, under the banner of Technical Barriers to Trade;

(b) each side preserving their autonomy over their own Sanitary and Phytosanitary regime for the protection of human, animal and plant life and health and the environment (principally this would concern organic material and live exports crossing the UK/EU borders);

(c) provisions for sustainable development covering the protections afforded by labour and environmental law (with no elaboration as to what this might mean);

(d) reciprocal commitments not to weaken or reduce environmental protection in order to encourage trade or investment;

(e) the right of each party to set its environmental priorities and adopt or modify its environmental laws;

(f) commitments to continue to effectively implement multilateral environmental agreements;

(g) the inclusion of co-operation provisions (but not dispute resolution, should either side be considered by the other to have lowered its standards in breach of the agreement).

The UK is therefore suggesting no more than non-regression from current standards and definitely not dynamic alignment, which would involve the UK matching any increase in EU’s standards of environmental protection over time. As the non-regression commitment would be reciprocal, the EU would not be allowed to drop its standards from where they stand at the end of the transition period either.

Instead, the Government calls for governance provisions regarding each side’s implementation of the free trade agreement provisions that are “appropriate to a relationship of sovereign equals” and to be drawn from those included within other free trade agreements that the EU has in place with Japan and Canada. This would not give any enforcement role to the CJEU and instead would be based on a specially created Joint Committee, with mechanisms for dialogue and dispute resolution. The lack of any formal enforcement mechanism is unlikely to go down well with the EU who have repeatedly stated that maintaining high environmental standards is a prerequisite of full single market access.

The Government also acknowledges the need for sectoral agreements with the EU in certain areas such as fisheries, civil nuclear cooperation, aviation and energy. There are aspects of those agreements that would also be environmental related in nature, eg working closely with the EU on sustainable management of shared fishing stocks, a reaffirmation of commitments to tackling climate change, co-operation on nuclear safety and a commitment by the UK to establish a carbon pricing system which the UK would consider linking to the EU Emissions Trading System. These offers reflect the UK’s commitments under existing multilateral international treaties and appear to be less than the EU is looking for.

Effect:

• directly applicable EU legislation, such as the REACH chemical safety regulation and the Biocides Regulation continue to apply in the UK until the end of 2020.

• any new EU Regulations coming into force during the transition period will also be retained as part of domestic law from 1 January 2021. This may, for example, apply to the Sustainable Investment Regulation that is currently making its way through the EU legislative process.

• EU Directives with an implementation date on or before 31 December 2020 must still be written into UK domestic law, for example, changes required by amendments made to a number of directives relating to waste that are due by 5 July 2020.

• infraction proceedings by the European Commission against the UK for non-compliance continue and can be taken in respect of further breaches occurring during the transition period.

• post-transition period watered down of current levels of environmental protection may be prevented “by level playing field” provisions in the future relationship deal.

• the UK no longer participates in the European Environment Agency.

At the end of transition – will there be elements of no deal?

• At the end of the transition period, if the new trading relationship is not in place, there could be a situation similar to no deal at that point. It is more likely that this will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules, even though the UK Government has ruled out extending the transition period. Both sides
The EU’s negotiating mandate

In the EU negotiating mandate, the need for “robust commitments” ensuring a level playing field (as included in the Political Declaration) is reiterated and this, plus safeguarding high standards of environmental protection, are cited as underlying principles and key objectives of the negotiations.

The mandate recognises that both parties should be free to regulate on environmental matters where their legitimate public policy objectives so require. However, it requires that the common level of environmental protection provided by not only laws and regulations, but also “practices” (presumably meaning implementation by regulatory bodies) of the EU and the UK will be not lower than the level provided by the common standards applicable at the end of the transition period in at least the following environmental regimes:

- access to environmental information;
- public participation and access to justice in environmental matters;
- environmental impact assessment and strategic environmental assessment;
- industrial emissions, air emissions and air quality targets and ceilings;
- nature and biodiversity conservation;
- waste management;
- the production and use of chemical substances;
- the protection and preservation of the aquatic environment;
- the protection and preservation of the marine environment;
- health and product sanitary quality in the agricultural and food sector;
- the prevention, reduction and elimination of risks to human and animal health or the environment arising from the production, use, release and disposal of chemical substances; and
- climate change.

This is a broad list that will encompass most of the areas currently covered by EU environmental regulation. Omissions include the regime for the control of major accident hazards, the offshore oil and gas safety directive, requirements to report on environmental matters within financial accounts, the sustainable finance agenda, including the EU taxonomy under consideration, together with the circular economy agenda (to the extent it goes beyond waste management and concerns the reduction in use of raw materials and avoidance of waste).

Secondly, the mandate requires minimum commitments reflecting standards, including targets, in place at the end of the transition period. This seems designed to capture non-binding standards and targets agreed at EU level, such as the EU 2020 target for energy efficiency.

Thirdly, the mandate requires each side to “respect” four key environmental principles:

1. The precautionary principle – to take action to avert environmental harm even if the scientific evidence is not complete.
2. The preventative action principle – that action should be taken where possible to prevent harm before it occurs.
3. Rectification at source – that environmental harm should be remedied in priority to the payment of compensation or by offsetting elsewhere.
4. The polluter pays principle – that risk should sit with the party causing the harm.

Fourthly, the mandate requires that the UK puts in place a transparent system for effective domestic monitoring, reporting, oversight and enforcement of its obligations by an independent and adequately resourced body or bodies. On this aspect, see our discussion below with regard to the proposed new Office for Environmental Protection.

A separate section deals with climate change – requiring the UK to maintain a system of carbon pricing, with consideration to be given to linking it to the EU Emissions Trading Scheme, to include provision for a possible increase of the level of ambition over time.

Finally, paragraph 110 of the mandate even suggests that where the parties raise their level of protection over time, this acts as a ratchet, with no backsliding permitted to encourage trade and investment, even if the level of protection would still be above that in place at the end of the transition period.

The EU envisages that the level playing field rules will be backed up with an enforcement and dispute settlement mechanism and that the EU (but not the UK seemingly) will have the ability to unilaterally impose “interim measures” where it considers that the level playing field is being undermined. It is hard to see the UK accepting anything other than a mutual right to do so.

have set out their respective negotiating positions. The UK and the EU have also released their versions of the draft UK-EU FTA - for further updates, please subscribe to our Brexit blog. There will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply and no-deal guidance therefore remains relevant. See the accompanying section: Leaving the EU – The process and preparations.

- The body of EU law in force at the end of 2020 will be imported into UK law (with necessary amendments) under the European Union (Withdrawal) Act 2018 and the UK legislation made to implement EU law will be retained, with suitable amendments - this will be called “retained EU law”.
- A lot of the secondary legislation to make such amendments has already been made, but further adjustments may be required by the terms agreed for the future relationship. The Government has published a series of 100+ practical no-deal notes with advice for companies.
- The Environment Bill currently before Parliament would establish a new Office for Environment Protection empowered to enforce implementation by Government and other public authorities of their environmental legal obligations and will put the Government’s 25 Year Environment Plan on a statutory footing, requiring the adoption of new targets in certain areas.
- The Government is making preparations for a standalone UK version of the EU chemicals regime (REACH).
- It has also been announced that a carbon tax will replace the UK’s membership of the EU emissions trading scheme, pending a standalone UK trading scheme being established.
The EU draft trade agreement

The EU published its draft text of a trade agreement, titled the “Agreement on the New Partnership with the United Kingdom” on 18 March 2020 (the “EU TA”), although the draft had leaked from Brussels some time earlier. The UK has not yet released its own version.

Section 6 to 8 of Title III (level playing field and sustainability) of the draft EU TA seek to implement the provisions of the EU negotiating mandate described above. The non-regression provisions of Section 6 make clear that enforcement of environmental law (as well as the provisions of the law itself) needs to be as effective as at the end of the transition period. We consider below the provisions of the Environment Bill that would introduce a new UK environmental watchdog to replace the enforcement function currently exercised by the European Commission regarding the UK’s obligations to implement EU environmental law).

Regarding increased future levels of environmental protection, the draft EU TA would give to a Partnership Council the ability to lay down standards providing for a higher level of environmental protection and would even allow it to expand the list of environmental protection subject areas covered by the trade arrangements. It seems unlikely that a power to expand the remit of the trade agreement will be acceptable to the UK Government.

The draft EU TA would require the UK and the EU to continue to abide by the requirements of multilateral environmental treaties to which they are already party and for them to co-operate on trade-related aspects of environmental policy in the international arena.

Adherence to international agreements on climate change features prominently in the draft, which includes a statement of the parties’ commitment to strengthening the global response to the existential threat that climate change poses to humanity and in particular it demands they respect the Paris Agreement 2015 and refrain from any acts or omissions that would undermine or materially defeat its object and purpose. This could prove controversial with regard, for example, to the expansion of UK aviation or investment in new road infrastructure, where objectors have already called into play the UK’s Paris Agreement commitments in bringing legal challenges against Government policy instruments. The draft EU TA also requires the parties to facilitate removal of barriers to goods and services needed for climate mitigation and adaptation such as those needed in connection with renewable energy and energy efficiency.

Further provisions deal with international obligations on the protection of endangered wildlife and conserving biodiversity, combatting illegal logging and respecting the provisions of instruments agreed under the auspices of the UN Convention on the Law of the Sea with regard to the marine environment. It also requires co-operation in international fora on the issue of sustainable trade and investment. However, in contrast to other areas covered by the draft EU TA, disputes on the sustainable trade and environmental aspects would first be dealt with through consultations between the parties, and if this fails, could be referred to a panel experts, whose report would be made public, and the “losing” party required to set out the measures it proposes to take to address the findings.

Initial discussions on the level playing aspects of the trade deal are, however, reported to have been largely a standoff between the parties.

During the transition period

Under the terms of the Withdrawal Agreement, the UK will continue to apply existing EU environmental law during the transition period together with any new EU Regulations entering into force and any new statutory instruments adopted to implement EU Directives. The UK will not, however, be bound to implement Directives if the implementation date falls after the end of the transition period. If the implementation date falls before that date and the UK has failed to implement on time, the obligation to implement will become part of retained EU law, if the provisions to be implemented are clear enough to have “direct effect”. However, during the transition period, the UK is not permitted to be part of the EU law making process and is no longer a member of EU bodies such as the European Environment Agency or the European Chemicals Agency. See the discussion of retained EU law in the accompanying section: The UK’s new legal order post-Brexit: A new class of UK law.

Under the Withdrawal Agreement, all open cases against the UK before the CJEU for non-compliance with EU environmental law (“infraction proceedings”) at the commencement of the transition period will continue and new ones may be commenced up to the end of transition – such as in relation to nitrogen dioxide levels in urban areas - continued on 31 January 2020. Pending proceedings at the end of the transition period (called the implementation period in UK legislation) will be dealt with in accordance with EU law and the CJEU will have the final word. If the UK then loses the case, it will still be legally bound to comply with any order.
made by the CJEU, once any appellate processes within the EU regime are exhausted.

In addition, the European Commission can bring new proceedings against the UK for up to four years after the end of the transition period, for breaches occurring at any time before the end of the transition period, including those happening after the UK left on 31 January 2020.

**After the transition period**

**Adjustments required to retained laws**

At least a third of domestic environmental legislation employs various links to EU primary legislation and EU agencies and advisory bodies and hence this is an area where the Government has been relying on the “Henry VIII” clauses within the European Union (Withdrawal) Act 2018 (the “Withdrawal Act”) to make adjustments. Most have proven to be uncontroversial, but some involve substantial changes such as that relating to the establishment of a replacement UK chemicals regime or, for example, in relation to pesticides regulation there has been criticism for simply removing the need for the Government to consult scientific advisory bodies without inserting a replacement mechanism.

**Enforcement of Government-level obligations in EU retained law**

One of the most troubling aspects of Brexit for environmentalists is the vacuum that would result at the end of the transition period, following removal of the powers of the European Commission to enforce implementation by the UK of obligations deriving from EU law via infraction proceedings (as mentioned above). The CJEU ultimately has the power to levy considerable fines, if its orders to come back into compliance are not complied with. Without this “stick”, how could the UK Government be obliged to honour these obligations?

However, the Environment Bill re-introduced to Parliament in 2020 contains provisions to establish a new Office for Environmental Protection (“OEP”) with powers to hold the Government and public authorities to account on their environmental obligations, designed to alleviate the widespread concern expressed by the UK environmental community. As well as advising the Government on environmental policy, the OEP would have monitoring and reporting obligations and the ability to take enforcement action through a complaints procedure and, if unresolved, through a new environmental review mechanism in the courts. However, these plans have been heavily criticised for lack of independence in the appointment of OEP members and funding and are likely to be the focus of amendments tabled during the Bill’s passage through Parliament. Additionally, the EU TA requires that the UK watchdog is able to impose “adequate” remedies on public bodies and authorities for breach, but not necessarily a fine. The ability for the OEP to impose a fine is being resisted by the UK Government.

**Changes to the UK environmental regime post-Brexit**

Unless otherwise agreed as part of the future relationship trade negotiations (as set out above), the UK would be free at the end of the transition period to amend environmental law as it sees fit, albeit within the confines of the UK’s obligations under international environmental law and the various multilateral environmental conventions that the UK is signed up to. In many areas, this involves the UK regaining responsibility for policy setting that it has not had control of for several decades. The UK has, however, been a very active participant in environmental law making in Europe.

Although there is concern regarding future watering down of environmental protection after Brexit, the UK Government denies that that is in any way its intention and has instead said with regard to the new Environment Bill that:

> “The measures in the Bill will ensure that environmental ambition and accountability remain at the heart of government after Brexit. We will improve air quality so that our children live longer, restore and recover environmental biodiversity, strive towards a circular economy, and ensure we can manage our precious water resources in a changing climate…. The Environment Bill will establish a comprehensive legal framework for environmental improvement. It will chart a clear course for a greener future, creating a new, world-leading Office for Environmental Protection that will hold this government and future governments to account.”

The first part of the draft Environment Bill puts the Government’s 25-year environmental improvement plan on a statutory footing and establishes processes for monitoring its implementation and for reviews of the plan to take place every five years. It also seeks to maintain EU environmental principles (currently in the EU Treaty) in UK law - such as the precautionary principle. The principles will, however, be for policy guidance only rather than conferring any directly actionable legal rights.

However, particular areas of EU regulation where the UK has struggled to comply and that are not themselves prescribed by international treaty obligations (such as air quality targets) or which are very burdensome and unlikely to be achieved by the current deadlines (such as the need to improve the quality of water bodies), could be early candidates for adjustment.
Overall, continued policy alignment with the EU27 is likely in most areas, particularly on issues such as single use plastics, the use of best available techniques for industrial facilities and climate change. It is unlikely to be publicly acceptable, for instance, if environmental standards in neighbouring EU Member States begin to surpass those applied in the UK. Some will remember when the UK used to be characterised as “Dirty Man of Europe”.

Environmental protection and trade

Pressures to relax existing restrictions imposed for environmental, safety or plant or animal protection may materialise in free trade negotiations with third party countries such as the US. The US has often complained about EU animal welfare regulations as imposing unwarranted barriers to trade affecting its exporters. DEFRA has sought to impose carbon pricing of at least the same scope and effectiveness as the EU Emissions Trading Scheme (“EU ETS”).

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Sectoral issues

Chemical regulation

The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 if brought into force at the end of the transition period, will introduce a new UK REACH regime regulating chemicals manufactured within the UK or imported into the UK, top mirroring the 2006 EU Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (“REACH”). In the UK REACH system, the HSE would fulfil the functions of the European Chemicals Agency (“ECHA”).

Divergence amongst parts of the UK

Scotland, Wales and Northern Ireland have devolved powers over environmental legislation and indeed there is already a fair amount of divergence between them in this regard. Divergence can bring practical difficulties for business with cross-border operations. Up till now, the supremacy of EU law has acted as a restraining force keeping differences in check. The Withdrawal Act granted the UK Government powers to retain the competences returned from Brussels, rather than their forming part of the devolved competence of the Scottish, Welsh and Northern Irish assemblies. The intention is that the scope of the devolved competence should remain essentially the same as when the UK was part of the EU. The current intention of the Westminster Government is therefore to establish new UK-wide common frameworks in areas such as agriculture, chemicals, waste, fisheries and food standards. In addition, international treaties to which the UK is party prior to the end of the transition period should also still unify UK environment laws to some degree. Retained EU domestic law passed by the devolved assemblies is likely to remain largely within their competence to amend so long as the changes fit within the new framework, which may require some changes from current implementation of EU law by the devolved assemblies.

Climate change and emissions trading

The Draft Trade Agreement includes in section 7 commitments on the UK and the EU to uphold the UN Framework Convention on Climate Change and the more recent 2015 Paris Agreement. In particular, it commits both sides to the objective of achieving economy wide carbon neutrality by 2050 and the UK would be required to implement a system of carbon pricing of at least the same scope and effectiveness as the EU Emissions Trading Scheme (“EU ETS”).

The EU ETS is the EU’s principal method of controlling industrial emissions of greenhouse gases – and has also been a key tenet of the UK’s strategy to meet domestic and international carbon targets.
Prior to agreement of the Withdrawal Agreement, the European Commission suspended the issue of free allowances to UK operators to preserve the integrity of the carbon market, if those operators were to sell-off their allowances because they were no longer needed. As a result, some operators found themselves with a shortfall where they had been relying on satisfying their current year’s surrender obligations with the newly issued allocations, causing real cash flow difficulties in some cases such that the Government was required to effectively bridge the shortfall. This suspension was subsequently lifted on 3 February 2020, following ratification of the Withdrawal Agreement by the EU and the UK which enabled the UK to start issuing 2019 (and 2020) allocations and resume auctions. It is intended that this year’s auctions will include both 2019 and 2020 allowances.

Under the Withdrawal Agreement, the UK remains a full participant in the EU ETS during the transition period and operators are required to meet their compliance obligations in respect of their 2019 and 2020 emissions. The last deadline for UK operators participating in the EU ETS is the 30 April 2021 deadline to surrender allowances equivalent to 2020 verified emissions. UK operators will retain access to their accounts up until this date to enable compliance with their obligations. UK Regulators will enforce compliance obligations for the 2019 and 2020 scheme years.

After the transition period, current participants in the EU ETS who are operators of UK installations will no longer take part in the system. The UK Government announced in the Spring 2020 Budget that the Finance Bill 2020 would include powers for HM Treasury to establish a standalone UK ETS, or a UK ETS that is linked to the EU ETS. The linked ETS is the UK Government’s preferred approach. The EU’s Draft Trade Agreement would commit the EU to giving serious consideration to a request made by the UK to link a UK ETS to the EU ETS, provided that this poses no risk to the integrity of the EU ETS and that “an increase in scope and effectiveness is ensured”. This last condition presumably means the UK committing to extend the scope of the UK ETS to further sectors of the economy over time.

Originally proposed in August 2018, the carbon emissions tax was intended as an interim measure in the event of a no-deal Brexit to maintain a carbon pricing policy until a replacement ETS was established. Implementation of the provisions of the Finance Act 2019 which set out the framework for the tax was delayed. HM Revenue & Customs (HMRC) published a Tax Information and Impact Note in March 2020 setting out the details of the carbon emissions tax and the changes the proposed Finance Bill 2020 would make to the tax provisions in the Finance Act 2019. The declared intention is to consult in Spring 2020 on how the tax would operate if introduced, in order to inform secondary legislation to be laid in late 2020.

The Finance Bill 2020 was introduced to Parliament on 17 March 2020. It provides both for a UK ETS and a carbon emissions tax. Concerns with regard to volatility of a standalone UK ETS are addressed in the Bill by provision for market stability mechanisms, such as a cost containment mechanism to respond to any significant short-term price fluctuation. This would operate by setting a ceiling price together with an auction reserve price to establish a price floor.

"Environmental protection is at the heart of the EU psyche and the EU’s stance on locking the UK into future improvement on standards is likely to be a principled belief rather than a mere negotiating stance. At the same time, the COVID-19 pandemic has unfortunately delayed the passage of the Government’s flagship Environment Bill – which would establish a replacement oversight mechanism for the UK to be held to its current obligations under EU law and set in place a new domestic framework for environmental policy taking us past the end of the transition period."