

# Research paper on the level playing field

EU-UK trade relations:  
why environmental policy  
regression will undermine the  
level playing field and what  
the UK can do to limit it



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# Executive Summary

The so-called 'level playing field' has emerged as a make – or – break issue in the trade negotiations between the European Union (EU) and the UK. In this research paper, we explore how a playing field in international trade might or might not be considered 'level', and explain why the environment is perceived to be especially important in EU-UK trade negotiations. We explain why and how the EU has created a regulatory level playing field in environmental policy matters over the last 50 years and discuss how the resulting harmonisation between the UK and EU could be disrupted if one side decides to raise its existing standards (policy progression) and/or reduce them (policy regression) after Brexit.

We find that the EU has been consistently clear in its desire to preserve the existing level playing field. It wants detailed and enforceable commitments on non-regression to be inserted into the text of the final agreement with the UK. The UK has stated that it does not intend to regress its standards – although without actually using that term or the term level playing field – but has not yet offered to make its commitment legally binding. Furthermore, the EU would like both sides to make a legal commitment to continuing policy progression; the UK has not yet agreed to reciprocate.

We then explore how environmental policies in the UK could conceivably regress after Brexit. Of the many different forms that policy regression could take, deregulation (the active removal of existing legal protections from the statute book) has attracted a good deal of public comment,

but is the least likely to occur in practice. The academic literature recognises three other forms of policy regression – 'by default', 'symbolic' and via 'arena shifting' – that are more subtle and arguably more likely to occur after Brexit.

Policy makers can adopt a number of strategies to limit policy regression. At the end of the transition period, UK policy makers will enjoy the regulatory autonomy to choose what they want to do. We identify a number of strategies that the UK Government can implement within and outside the framework of the EU-UK agreement that would limit policy regression. Crucially, we show that the UK does not have to wait for the EU to act first; it can even respond if no trade deal at all is struck with the EU (i.e. a 'no-deal' situation).

We conclude that even if the UK and EU manage to square their current differences and strike an environmentally ambitious trade deal, the debate about level playing fields and non-regression will almost certainly continue. It will re-appear in relation to UK devolution, 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 level playing field within the UK. And it will also flare up when the Government attempts to strike new trade deals with countries that have lower environmental standards than the UK's. At that point, the tables are likely to turn and the UK Government will find itself under pressure to adopt strong level playing field standards to prevent its producers from being undercut by competitors out with Europe.

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# 1. Introduction

Negotiations between the EU and the UK to establish a new relationship between one another have reached a critical stage. The original plan was to complete a number of rounds of negotiation before early June 2020 in order to agree a new relationship before the current transition period comes to an end on 1 January 2021, at which point the UK is scheduled to leave the EU Single Market and Customs Union.

After several negotiating rounds – some of them held virtually because of COVID-19 – the two sides have identified some areas of convergence, but also some areas of very serious divergence. If these differences are not bridged, it could jeopardise the chance of agreeing a new relationship by the end of this year.

In addition to a number of issue specific disagreements on matters such as fisheries, justice and law enforcement, the EU's chief negotiator, Michel Barnier, has repeatedly underlined the importance of the divergences on three meta-issues (Barnier, 2020a):

■ **The structure of the final agreement:** the EU would like a single all-encompassing agreement, 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, modelled on, but more ambitious than, the approach it used in relation to the Ukraine and Georgia. For some time, the EU has been anxious to avoid the kind of patchwork of standalone agreements that it has signed with Switzerland (European Commission 2018a/b).

■ **The governance of the agreement:** the EU is seeking one overarching governance system to monitor and enforce the agreement with the Court of Justice of the EU (CJEU) having a role to play whenever it comes to interpreting EU law. The UK on the other hand wants multiple issue-specific processes, in which the CJEU is not involved at all in arbitrating joint disputes.

■ **Level playing field commitments on state aid, workers' rights, and social and environmental protections that seek to maintain the existing level playing field after the end of the transition:** Barnier (2020b) has made it abundantly clear that the EU will not adopt a comprehensive tariff and quota free deal with the UK unless it contains robust and enforceable rules on these matters. UK politicians and officials have repeatedly said that the UK does not intend to regress, but they repeatedly choose not to use the terms non-regression and the level playing field.

At the end of April 2020, UK representatives said that it would be very difficult to strike a new trade deal unless the EU gave ground on these issues and one other – fisheries (Parker and Brunsden, 2020).

In this research paper we concentrate on the environmental aspects of the level playing field. In particular, we:

■ **Explore what is meant by a level playing field and explain why the EU's level playing field with regards to environmental standards is so important to both sides in the negotiation.** In principle, the level playing can be threatened by one side raising its existing standards (environmental progression) or reducing them (environmental regression).

- ***Explain what is meant by regression and explore the potential ways in which environmental policies in the UK could regress after the transition comes to an end.*** Even though both sides have publicly committed to maintaining existing standards, in practice the EU has been the most vocal about its fears that the UK will regress its standards after the transition. It is absolutely 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.
- ***Identify and explore the steps that could be taken in the UK to reduce the risk of policy regression after the end of the transition period and compare these with the steps (some existing, some new) that the EU has proposed to take to preserve the existing level playing field.***

Although the EU is keen to negotiate a deal on the level playing field that embraces state aid, workers' rights, social and environmental protections, in this research paper we deal only with the environmental aspects and in particular the threat posed by regression. In addition, we explore these environmental aspects only from a UK perspective; the issues and debates we touch upon should also be explored from an EU perspective.

## 2. Level playing fields and policy regression: what are they?

### Level playing fields

The level playing field is one of the most commonly used terms in international trade negotiations (M. Johnson, 2020). However, there is no standard definition that all trading partners use (Jozepa, *et al.* 2020: 8), and some seasoned trade negotiators even regard it as an inherently and perhaps even deliberately vague concept (M. Johnson 2020). According to the OECD (2020) it arises from the desire for “all countries and firms to compete on an equal footing to offer consumers everywhere the widest possible choice and the best value for money”. In practice level playing field discussions routinely touch upon many aspects including tariffs, quotas, subsidies, research and development assistance, and rules and administrative procedures (M. Johnson 2020). In environmental policy, regulatory rules and standards are especially pertinent.

According to the House of Common Library (Jozepa *et al.*, 2020: 8), a level playing field is a “set of rules and standards which are deemed equivalent and must ensure fair competition between trading partners”. *In general terms, the less equivalent the rules are, the greater the risk of unfair competition.* For example, imagine two producers of very similar products: one operates in a country with stronger environmental policies, the other operates in a country with weaker standards. There is no level playing field. Hence, the producer operating in the country with higher standards is at risk of being undercut by its competitor who does not have to operate to the same high level of environmental protection.

### Policy regression

Modern preferential trade agreements often contain specific legal provisions that seek to uphold environmental standards, maintain a level playing field and thus facilitate fair and open competition between the various trading partners. These provisions aim to prevent the partners from regressing their environmental standards (from the equivalent standards

represented by the level playing field) to secure a competitive advantage for companies in their territory (Nesbit and Baldock, 2018: 4). The legal provisions that attempt to prevent regression from occurring are known as non-regression clauses (Jozepa, *et al.* 2020: 8). This is why many legal definitions of a particular level playing field often refer to regression. For example, the Institute for Government defines a level playing field as a “set of common rules and standards that are used primarily to prevent businesses in one country undercutting [via regression] their rivals in other countries, in areas such as workers’ rights and environmental protections” (Institute for Government, 2020).

### Different types of environmental policy regression

Just as the evenness of a playing field is open to subjective interpretation, so too is the practical meaning of regression. There is certainly no widely agreed legal definition of regression because it can conceivably extend to many different aspects – laws, oversight procedures, research and development funding etc. This is why the text of modern preferential trade agreements, refers to non-regression in a host of different ways. Taking regulation as one example, it has, for example, been equated with the wholesale removal of existing policies (i.e. the equivalence of legal standards). The EU-Korea trade deal also refers to another potential form of non-regression that focuses on what happens in practice rather than the letter of the law. This aims to prevent not the deliberate removal and/or dismantling of existing legal protections for the environment, but failures to implement them in practice (‘equivalence of policy implementation’). Thus a:

***“Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties” (Article 13.7)***

The same formulation also appears in the EU-Canada trade agreement (CETA), Article 24.5.3.

The phrase ‘sustained or recurring’ in this particular formulation suggests that single, isolated examples of regression are less important than ones that are regularly repeated.

The extent to which standards are actually implemented and enforced is therefore a vital aspect to bear in mind. Non-regression clauses could in principle be very strictly enforced by parties using trade sanctions (tariffs or quotas could, for example, be imposed on countries that are perceived to be breaching their commitments). However in practice, non-regression clauses (and indeed international environmental laws in general) are not that strictly enforced (Nesbit and Baldock 2018: 10) and in fact are widely perceived to have had provided rather limited environmental protection (Jozepa, et al. 2020: 8; Lydgate 2018). These weaknesses go a long way to explaining why the EU does not rely on non-regression clauses to maintain the level playing within its borders. Rather, the EU has established much stronger mechanisms to prevent regression, backed up by targeted enforcement powers including the threat of fines in the most extreme cases.

Finally, regression has been couched in terms of the maintenance of particular policy outcomes (i.e. ambient levels of pollution in the atmosphere for example – ‘equivalence of outcomes’). For example, Article 24.5 of CETA states that:

*“Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in environmental law”.*

We shall show that this particular formulation appears in the UK’s draft of a new UK-EU trade agreement.

## Summary

In summary, regression and the level playing field are open to many different and often conflicting interpretations even within a single trade negotiation. Even with respect to a particular type of playing field (namely a regulatory one – the most salient type in environmental policy), equivalence can relate to legal standards (‘equivalence of policy standards’), to their practical implementation (‘equivalence of policy implementation’) and/or the resulting state of the natural environment (‘equivalence of policy outcomes’).

In theory, policy progression can also make a playing field less level, but in practice (and certainly within EU-UK negotiations) policy regression is perceived to represent a more serious threat. Indeed, trade negotiators dedicate their careers to crafting legal mechanisms to prevent the threat (and reality) of policy regression from disrupting fair trade.

Finally, it is important to remember regression and level playing fields are widely discussed in all trade negotiations. The current debate about policy regression and level playing field in EU-UK trade talks is, however, part of a long-running debate within Europe on the scope and need for regulatory (dis)alignment; one which started after the Second World War, which entered a new phase when the UK signalled its determination to leave the EU, and will continue well into the future (Armstrong 2018). We return to this important point in our concluding section.



# 3. Why is the level playing field so important in EU-UK trade negotiations?

## The origins of the level playing field in the EU

The level playing field in environmental policy together with non-regression emerged as a particularly significant flashpoint when the UK formally left the EU at the end of January 2020. The reason is that the *EU Single Market arguably represents one of the most complete examples of a level playing field anywhere in the world* (Institute for Government, 2020; M. Johnson, 2020). The EU has spent decades constructing it, over time encasing it in a complex, multi-levelled system of policy and governance, including relatively powerful enforcement mechanisms (Jordan and Moore, 2018a). The environmental aspects alone amount to over 500 major laws and hundreds more technical rules, many of them directed at maintaining a level playing field by actively managing environmental regression (Jordan and Adelle 2012).

One powerful rationale to adopt a level playing field within the EU was undoubtedly *environmental* – i.e. to prevent pollution transferring from the member states with weaker environmental standards to neighbours, harming their citizens and their natural environments.

But the level playing field within the EU has always been about more than the protection of the environment for its own sake. Another, arguably more powerful rationale was and still is *economic* – i.e. to prevent one member state from unfairly gaining a competitive trade advantage by weakening (or ‘regressing’) its environmental standards relative to the rest, or through an unlimited use of state aid, i.e. direct or indirect financial support from a government for a particular industry or company within its territory.

A third and final rationale for establishing common level playing field provisions in the EU (i.e. the desire to protect national *welfare states* in Europe and set a baseline for workers’ rights and social protection) has arguably been less important in the development of EU environmental policies.

## Policy progression and regression in EU environmental policy

In EU environmental policy, the resulting rules generally set minimum standards that all states must abide by. The primary purpose of common (or ‘level’) standards is to prevent environmental regression and thus unfair competition. The Lisbon Treaty states that EU policy should aim for a high level of environmental quality, which is in effect 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’), but this is not entirely unfettered.

## The environmental level playing field in the Article 50 process

Given this long history of concern (and resulting regulatory alignment), it was not entirely surprising that from the start of the Brexit process, the EU was anxious to underline the importance of preserving the existing level playing field. For example, in a speech in March 2017, Michel Barnier argued that regulatory divergence between the UK and the EU should not result in what he termed “regulatory dumping” – that is, environmental regression (European Commission, 2017). In the midst of the Article 50 process, when the UK was undergoing an agonising internal debate on whether Brexit should even proceed, the Commission was busy publishing details of its negotiating position, in which the “non lowering of [existing] standards” was a major recurring theme (European Commission, 2018b). In another speech around a year later, Barnier stated that the EU would only strike a deep and comprehensive trade deal with the UK if it contained a formal, enforceable non-regression clause (European Commission 2018c). In fact, given the well-known limitations of such clauses in (see above), the agreement with the UK should, Barnier argued, be much tougher, “prevent[ing] any reduction of the key pre-Brexit standards” by having

more “effective oversight and enforcement of environmental rules” (European Commission 2018c). *In other words, the EU wanted to ensure continuing ‘equivalence of policy outcomes’ by linking strong non-regression commitments (‘equivalence of policy standards’), to governance mechanisms that ensured an ‘equivalence of policy implementation’.*

The EU’s desire for toughness directly informed the original (2018) draft Withdrawal Agreement with the UK, where level playing field provisions were a key part of the now notorious ‘backstop’ provisions set out in the Protocol on Ireland and Northern Ireland. These would have applied to the whole UK in the absence of satisfactory alternative arrangements being agreed in the years immediately following the UK’s withdrawal. These provisions were expressly linked to the then envisaged UK-EU ‘single customs territory’. When the Johnson government upended the UK’s whole approach to the Northern Ireland/Irish question, the level playing field provisions were unceremoniously removed from the UK-EU Withdrawal Agreement.

But the EU was unwilling to let the matter rest; it was instrumental in ensuring that the revised Political Declaration – the non-binding agreement between the EU and the UK that established the broad shape and direction of the future relationship – made explicit references to non-regression and the level playing field. In it, the two sides arrived at what the EU hoped and believed was a shared understanding of the most pertinent level playing field issues (Morriss, 2020). In fact, a whole section of the version signed by Boris Johnson Government in October 2019 was dedicated to them.

It is worth quoting the final Declaration at length to illustrate the key points that were and still are in contention.

■ **‘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’.** In other words, the UK and the EU are starting out from a position of regulatory convergence (‘a level playing field’). Regression by either party will disrupt that level playing field and risk generating greater transnational pollution.

■ **‘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’.**

There is, therefore, 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 in particular, the current level playing field is a vital pre-requisite for avoiding higher tariffs and even quotas in the future.

■ **“To that end, the Parties should uphold the common high standards applicable in the Union and the UK at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters”** (para 77). This statement implies that both parties may elect to progress (i.e. adopt higher standards) after 1 January 2021, but there should be no regression. Although there was some discussion between the May Government and Corbyn’s Labour Party on whether the UK should commit to pegging its environmental rules to those of the EU’s so that they tracked one another dynamically over time (‘dynamic alignment’) (Jordan 2019) (see also Jozepa, *et al.* 2020: 15), the new Johnson Government judged it to be anathema and insisted that it appeared nowhere in the final text (although importantly, dynamic alignment remains a broad objective of Scottish environmental policy makers).

# 4. Post-Brexit trade talks: what does each side want?

Since the signing of the Political Declaration in November 2019, the EU and the UK have concentrated on refining their respective negotiating positions. As they have become clearer, the positions have arguably also become more entrenched.

## The European Union

In its formal negotiating mandate (a 46 page document published on 25 February with 172 individual articles) (Council of the European Union, 2020), the EU underlined the importance of the following:

- One of the **overriding objectives** of the new agreement should be to “uphold corresponding high standards of protection over time” (Article 17) for the environment and climate change (Article 10); sustainable development should also be an overarching objective (Article 18). Overriding objectives play an important role in trade law as they often form a key reference point in any subsequent enforcement process.
- Both parties should respect **key environmental principles** (Article 103) – precaution, prevention, polluter pays and the rectification of environmental damage at source (Article 103).
- There should be “**robust commitments to ensure a level playing field**” (Article 17) to “prevent distortions of trade and unfair competitive advantage so as to ensure a sustainable and long-lasting relationship between both Parties” (Article 94).
- There should be **common monitoring of the implementation of the agreement** (Article 113) through “public review, public scrutiny and mechanisms to address disputes” (113).
- As regards governance, the 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). Because these governance arrangements do not at present exist, they will have to be painstakingly discussed, agreed upon and put into place (Jozepa, *et al.* 2020: 7), which will take time to negotiate and require ongoing financial resourcing.

Later, the EU issued the draft text of the deal that it eventually hopes to strike with the UK. Running to over 440 pages, it contains multiple annexes and various protocols. In Part 2 (Economy and Trade), Title 3 (Level Playing Field and Sustainability) (LPFS), Section 6 (Environment and Health), Chapter 2, it states that:

1. **Certain key policy principles** (see above) should be applied and respected (LPFS 2.30 (4)).
2. **Non-regression should relate to a specific list of ten areas of environmental policy**<sup>2</sup> (LPFS 2.30). Normally, non-regression clauses are not this specific. Moreover, non-regression in the EU-UK agreement should be pegged to standards that are in force “at the end of the transition period” and, importantly, also will include “those targets whose attainment is envisaged for a date that is *subsequent to the end of the transition period*” (our emphasis added). And crucially, if the current transition period is extended beyond 31 December 2020, the non-regression provisions should also encompass any new legislation that is adopted as part of the EU’s ambitious European Green Deal programme. Therefore in its intended effect, this clause would operate as a weak form of dynamic alignment (as described below).

<sup>2</sup> Namely: “(i) access to environmental information, public participation and access to justice in environmental matters; (ii) environmental impact assessment and strategic environmental assessment; (iii) industrial emissions; (iv) air emissions and air quality targets and ceilings; (v) nature and biodiversity conservation; (vi) waste management; (vii) the protection and preservation of the aquatic environment; (viii) the protection and preservation of the marine environment; and (ix) 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 (x) health and sanitary safety in the agricultural and food sector”. With the exception of item (x), this is the exact same list that appeared in the Mrs May’s Draft Withdrawal Agreement (in which, (x) was replaced by ‘climate change’. In other words, health and sanitary safety did not appear in that list.

3. There will be 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)). Crucially, this Council will be able to adopt binding decisions that set higher levels of protection than those in force at the end of the transition or add new issues to the basket of policies included in level playing field discussions (see Item 2 in this list).
4. A ***policy progression principle***<sup>3</sup> to ensure higher levels of protection in the future: moreover, any new standards that result from policy progression should themselves not regress (LPFS 2.31 (1)). This clause has been likened to an environmental “ratchet” (Jozepa, et al. 2020: 16).
5. Under the ***monitoring and enforcement part*** (LPFS 2.32), 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 collaborate with the EU Commission, and vice versa (LPFS 2.33 (1)).

Much of this language will have been all too familiar to UK negotiators – much of it was originally contained in the original text of the Withdrawal Agreement (specifically the controversial Protocol on Northern Ireland, which was removed at the request of Boris Johnson – see above). However, the language did not go away. In fact, the EU now appears to be proposing that it applies to *both* sides rather than just the UK, thus confirming early predictions that the original Withdrawal Agreement was the first draft of an

<sup>3</sup> Akin to Article 16.2 of the EU-Japan FTA, which states that: “each Party should strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve these laws and regulations and their underlying levels of protection” (emphasis added).

eventual trade agreement between the UK and the EU (for example, Jordan and Moore 2018b).

Time will tell whether Boris Johnson accepts this language at the second time of asking. The ratchet clause, the Partnership Council and the idea of dynamic alignment (however soft and conditional) will be especially challenging for him to sell to his supporters, since they undercut the promises he made during the referendum to restore the UK’s regulatory autonomy.

## The United Kingdom

The UK Government has repeatedly claimed that it will not regress its environmental standards after the transition period ends. A parliamentary question in October 2019 elicited the following reply:

*“Our high regulatory standards are not dependent on EU membership. The UK has an exceptional track record of environmental protection and this will not change as we leave the EU” (cited in Jozepa, et al. 2020: 49).*

The 2019 Conservative Party manifesto will be remembered for its brevity, but it did pledge to legislate to “ensure high standards” of environmental protection. We “will not compromise on .... high environmental protection” standards in new trade negotiations, it continued, but did not appear to commit to raising existing standards (via the progression principle) or ensuring greater democratic scrutiny of environmental and trade policy decisions (West and Buck 2019).

The UK eventually published its negotiating mandate in February 2020 (HM Government 2020). Running to 30 pages with 64 articles, it was considerably shorter and much less detailed than the EU’s mandate. It envisaged that two chapters of the final agreement would address environmental matters:

- **Chapter 24** – on trade and sustainable development (containing just one line of description) (see page 16)

■ **Chapter 27** – on trade and development (containing 11 lines of description). There were no explicit references to non-regression or the level playing field, but it stated that the new agreement “should include reciprocal commitment not to weaken or reduce the level of protection afforded by the environmental laws” of either party. However, pointed references were also made to the UK’s sovereign “right” to “set its own environmental priorities and adopt or modify its environmental laws” outside the EU. Given the commitment not to regress, logically the only modifications would result in either similar or higher standards of protection.

Finally, with respect to governance, the UK maintained that the new agreement should “establish provisions between the parties on environmental issues”. However, “in line with [the] precedent” set by other EU trade deals (notably CETA), they “should not be subject to the Agreement’s dispute resolution mechanisms” (which are outlined in Chapter 32). Furthermore, there should be no role for the CJEU (page 17), even though the Withdrawal Agreement grants it a role in relation to Northern Ireland.

In his Greenwich speech on 3 February 2020, Johnson (B. Johnson 2020) added further detail: “[w]e will not engage in some cut-throat race to the bottom”, he promised. “The UK will maintain the highest standards in these areas – better, in many respects, than those of the EU – without the compulsion of a treaty.” In other words, what he appeared to say was that the UK and the EU may eventually choose to move in a similar regulatory direction as regards environmental protection, but henceforth the UK is determined to have the regulatory autonomy to make that decision for itself rather than pre-committed itself to march in lockstep with the EU on every single issue (i.e. dynamic alignment).

The UK’s chief negotiator, David Frost, gave a speech in Brussels a few days later that sought to add flesh to Johnson’s thinking. In it, he explained that the UK was not arguing with the EU for the sake of argument’s sake (Brunsden et al. 2020):

*“[t]o think that we might accept EU supervision on so-called level playing field issues simply fails to see the point of what we are doing. It isn’t a simple negotiating position which might move under pressure – it is the point of the whole [Brexit] project.”*

He continued:

*“We are not going to be a low-standard economy. That’s clear. But it is perfectly possible to have high standards, and indeed similar or better standards to those prevailing in the EU, without our laws and regulations necessarily doing exactly the same thing.”*

Again, he seemed to imply that the debate was really about different ways to achieve high or even higher environmental standards, *not* policy regression.

The UK eventually published the draft text of the ‘Comprehensive Free Trade Agreement’ that it eventually hopes to strike with the EU. Running to over 290 pages, it was heavily modelled on the text of the CETA agreement. Even so, the terms regression, progression and level playing field were not copy and pasted across and appear nowhere in the text. The key environmental provisions include the following:

■ **A right to regulatory autonomy:** both parties recognise 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)

- **An unspecific reference to not regressing existing standards:** “Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law” (Article 28.5).
  
- **No explicit reference to the environmental policy principles referred to in EU law (or the draft UK Environment Act):** precaution is, however, 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)).
  
- **An unspecific commitment to policy progression:** each Party shall “seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection” (Article 28.3)
  
- **An environment-specific form of dispute resolution:** a specific Committee on Trade and Sustainable Development will be created to oversee the environmental provisions of the Treaty (Article 28.12). A Panel of Experts can be formed to resolve any disputes (Article 28.14), but without powers 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.

# 5. Different strategies of regression: how they undermine a level playing field

## Regression as a type of policy dismantling

Evidently, there is more to debates about level playing fields and non-regression than first meets the eye. In the academic literature, regression equates to a particular form of policy change known as policy dismantling (Gravey and Jordan 2016). Dismantling has been defined as “the cutting, diminution or removal of existing policy” (Jordan, Bauer, & Green-Pedersen 2013, 795). Most policy ideas never make it on to the statute book. Only those that receive sufficient political support survive the vagaries of the policy adoption process. The fact that some politicians may set out with the aim of regressing those very policies has therefore always puzzled social scientists. After all, why would politicians risk upsetting groups that were sufficiently powerful to get their preferred policy ideas adopted in the first place? It is why political scientists in particular have often assumed that regression is a much more “treacherous” course of action for politicians to embark upon than the promotion of new policies (Pierson 1994: 1) (see also Bauer *et al.* 2012). In fact, those who seek to regress existing policies face a series of difficult choices on how best to proceed (or even whether to proceed at all).

## Strategies to achieve policy regression

First of all, to what extent is a *decision to regress actively taken*? At one extreme, politicians – and in particular ministers – may make a very clear and conscious decision to dismantle the existing regulatory framework, based on a strong belief that it will win them political credit. A host of de-regulatory drives and red tape challenges have arguably arisen from such a political calculation. Alternatively, they may decide that it is wiser to proceed cautiously e.g. not to update existing policies to meet changing demands – a kind of deliberate neglect.

Second, to what extent do they wish to *hide or reveal their activities*? At one extreme they may prefer to maximize the visibility of their actions to appeal to certain political groups. Alternatively, they may opt to hide what they are doing from potential opponents.

Together, these create two dimensions: between active and passive regression strategies; and between open and hidden regression strategies. The intersection of the two produces four ideal types of strategy to achieve regression. Figure 1 summarises the four main types and provides some illustrative examples of each drawn from the debate about future EU-UK

**Figure 1:** Four main regression strategies (with illustrative examples)

	Low visibility <i>Blame avoidance strategies</i>	High visibility <i>Credit claiming strategies</i>
No regression decision <i>Passive strategies</i>	<b>Regression by default</b> Policies are not updated to Reflect new conditions	<b>Symbolic regression</b> Deregulatory talk
Active regression decision <i>Active strategies</i>	<b>Regression by shifting arenas</b> Policy responsibilities are shifted e.g. to other levels – devolution	<b>Active regression</b> Repeal of existing policies

trading relationships. It is important to remember that the strategies are ideal types; in practice the four may overlap to a greater or lesser extent.

### ACTIVE REGRESSION

The first strategy accords with a common sense understanding of regression – i.e. the deliberate removal of existing policy protections in order to secure better trading opportunities. It may be that politicians are ideologically convinced that regression is the most appropriate solution, in which case they may adopt decisive steps especially if they perceive that they will encounter little opposition and/or be rewarded at the ballot box by regressing. Alternatively, they may adopt a sequence of incremental reforms to test the waters and/or head off opposition.

For example:

- Politicians could, as some fear (Cato 2019), **formally repeal existing laws or issue explicit instructions to implementing agencies to reduce the performance of policies.** However, the political and legal difficulties of employing this strategy (it could for example trigger political campaigning by opponents, or lead to lengthy judicial review procedures etc.), mean that it has not been used much at EU level (Gravey and Jordan 2016).
- **Regression could be pursued through a sequence of smaller cuts implemented via secondary legislation** (e.g. statutory instruments) which generally face much less scrutiny and thus opposition in parliament.
- **Politicians may reduce the budgets of oversight or implementing bodies in ways that reduce the effectiveness of existing policies.** Politicians could also create deregulatory

task forces and issue anti red tape challenges, perhaps with the longer term aim of fostering greater political support for regression. As Chancellor, Sajid Javid launched one at the 2019 Conservative Party conference.

### REGRESSION BY DEFAULT

A much more subtle strategy of regression is the *de facto* reduction of levels of policy protection by refraining from adjusting existing rules and practices to reflect changing external conditions, such as the state of the economy or scientific understanding. This strategy has a much lower visibility, as the absence of an explicit decision attracts less political attention than the launching of concrete plans and strategies to regress ('active regression').

For example:

- **Existing policies may not be updated in line with changing scientific advice.** For example, ministers may refuse to add a substance to an existing list of controlled substances when a new variant is developed or under-appreciated risks of existing ones are discovered.
- **Subsidies that support new green technologies (e.g. wind or solar power) can be de-linked from inflation,** making them progressively less generous over time. The same could be done to gradually reduce enforcement budgets over time.
- **Existing policies could have the 'review and revision' clauses removed from them so they are not actively updated over time.** Evidence has emerged that the way in which the UK Government has gone about 'retaining' the many hundreds of EU environmental laws on the UK statute book after Brexit, has increased the likelihood of 'regression by default' (Jordan



and Moore, 2020).

### **REGRESSION BY SHIFTING ARENAS**

This strategy relies on moving decisions to another political arena. It could also involve manipulating the procedural bases of a policy in a given arena, i.e. to change participation rights, thereby hiding some aspects from trading partners or domestic interest groups and voters. A more systematic form of arena shifting would be to transfer the whole policy (possibly with a markedly reduced budget) to another government level (i.e. decentralisation) or out to (newly established) agencies. In that way, any political costs of regression may not be directly attributed to the politicians that made the decision to regress.

For example:

- **Politicians can shift the responsibility for enforcing policies to different agencies at the same time as reducing their budgets and limiting their enforcement powers.**

Claims to this effect have been made about systems of health and environmental protection in the UK (Unchecked, 2019). There is an ongoing debate in the UK on the legal powers and resources that the new Office for Environmental Protection (OEP) should be granted at the end of the transition, when it is scheduled to take over some of the powers of the European Commission.

- **Politicians could shift responsibility to lower levels of government such as the devolved nations or even down to the city level.**

However, these alternative arenas may not have the resources or legal powers to deliver the same level of protection, or may struggle to coordinate with one another to maintain

a coherent level playing field within the UK (Burns *et al.* 2018).

- **Existing policy powers could disappear into a political void** – they could be removed from one agency but not moved across to a replacement body. Since the referendum result, UK environmental groups have repeatedly warned that some of the enforcement powers discharged by EU bodies such as the CJEU and the European Commission are at risk of disappearing into a post-Brexit ‘governance gap’ (Gravey, Jordan and Burns, 2016).

### **SYMBOLIC REGRESSION**

This final strategy involves politicians deliberately declaring that they intend to regress. However, policies may not actually regress that much. This could be because ministers wish to pacify a certain group demanding regression or because of real or perceived opposition from businesses and NGOs wishing to maintain high standards. But it may also be that politicians are not entirely convinced that regression is what voters really desire, i.e. they may talk about regression to appease those demanding lower standards (‘symbolic talk’), or they may simply wish to test the political waters in advance of deploying other regression strategies. Thus while deregulatory talk may not lead to concrete policy regression, it may create a political climate in which demands for more active forms of regression flourish and/or arguments in favour of higher standards struggle to make headway. Either way, simply talking about regression may be enough to inflame trade relations and provoke retaliatory steps that directly disrupt the level of the existing playing field.

For example:

■ ***Politicians may establish consultations to garner views on regulatory performance.***

The business department (BEIS) initiated a Reforming Regulation Initiative in March 2020 (BEIS 2020). They may also pledge in a general way to ‘fight red tape’ in a way that seeks to cultivate wider political support for regression. Commitments to combat red tape were made in the 2019 Conservative General Election manifesto.

■ ***Politicians may seek to sow doubt in the minds of the public and create confusion amongst policy groups.***

For example they may try to highlight the safeguards provided by legal commitments in international conventions, whilst neglecting to mention that such conventions normally lack strong enforcement powers.

■ ***Politicians may decide to continually highlight the costs and the complexities of environmental policy and/or extol the benefits of regressing.***

The current Environment Secretary, George Eustice, memorably described the EU nature directives as “spirit crushing” (Neslen 2016). The former Chancellor George Osborne claimed that they imposed “ridiculous costs” on business (Neslen 2016). In the 2019 Queen’s Speech, pledges were made to “tear away... bureaucratic red tape, to set our own rules, and to release the talent, creativity, innovation and chutzpah that exists in every corner of our United Kingdom.”

# 6. What can the UK do to reduce policy regression?

What steps could be taken to minimise regression within the UK? As noted in the opening section, we focus only on the situation within the UK.

## ACTIVE REGRESSION

Potential strategies:

- **Adopt strong, enforceable non-regression clauses** in the future relationship agreement with the EU and in UK-wide laws; insert similar clauses in the trade agreements that the UK strikes with other trading partners, underpinned by strong intra-UK common frameworks.
- **Adopt policy progression clauses** in the future relationship agreement with the EU and in UK-wide law; insert the same clauses in the trade agreements that the UK strikes with other trading partners, underpinned by strong intra-UK common frameworks.
- **Commit to public reporting on regression and progression:** the existing literatures tell us that politicians generally feel more comfortable revealing examples of policy progression to voters; they are not normally quite so willing to report examples of regression. Currently, the draft 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 therefore be amended to:  
a. cover all new policies that could 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. Finally, similar reporting commitments to these could be extended to all four UK nations to promote transparency and greater internal coordination.

- **Ensure that the bodies overseeing environmental policy development and enforcement (e.g. the OEP and the Environment Agency) have sufficient legal powers and resources to implement existing policies.**
- **Limit the use of types of delegated legislation that allow Ministers to regress policies with less parliamentary scrutiny.** Where delegated powers are used, they could be subject to scrutiny by parliaments, where relevant in all four nations of the UK.

## REGRESSION BY DEFAULT

Potential strategies:

- **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, insert binding ‘review and revision’ clauses into existing and new policies (Jordan and Moore, 2020).
- **Create a comprehensive system to ensure that existing environmental policies are regularly evaluated and updated over time** – analogous to the EU's system of ‘Fitness Checking’ overseen by European Commission. Systematic, evidence-based fitness checking that compares the benefits and the costs of policy protection has shown that the nature and the water framework directives are broadly ‘fit for purpose’.

- **Require the new Office for Environmental Protection to report regularly to Parliament on policy effectiveness.** The Environment Bill could be amended accordingly to require regularly reporting on the functioning of the level playing field (specifically in relation to trade agreement, which are reserved to the UK wide government). At present, clause 20 only requires the Secretary of State (i.e. not the OEP) to provide two yearly reports on “significant” developments in international environmental protection legislation. It is striking that this clause does not extend to reporting on UK wide legislation, where of course powers are split amongst the devolved nations.

## REGRESSION BY SHIFTING ARENAS

Potential strategies:

- **Ensure a four nation, UK-wide commitment to maintain and where appropriate raise standards.** At present the ambitions of the UK and Scottish governments are very different.
- **Ensure a level playing field within the UK** via agreed common frameworks, incorporating strong, enforceable clauses on non-regression and with commitments to policy progression. From a Scottish perspective, level playing fields imposed by Westminster that affect devolved matters (such as the environment) are not acceptable.
- **Ensure that local governments and other implementing agencies in the UK have the resources to ensure that existing policy protections are implemented.**
- **Ensure shared, UK-wide monitoring and reporting to establish the extent to which individual nations are regressing** (and thus potentially undermining the level playing field within the UK).

## SYMBOLIC REGRESSION

Potential strategies:

- **Develop a shared, UK-wide philosophy of Better Environmental Regulation.** By setting out in detail its overall philosophy, the UK may find it easier to explain to its trading partners when, why and for whom it wishes to maintain, progress or even regress standards in specific areas of policy (Jozepa, *et al.* 2020: 20).
- **Commit to detailed and regular reporting to independent agencies such as the OEP in the UK or the European Environment Agency (EEA) at EU level.** This would facilitate a more transparent debate on level playing field-type issues and, by ensuring more trusting relationships, could allow more mutually beneficial trade deals to be struck.
- **Commit to sharing information on environmental trends and processes with other trading partners to inform a more and trusting 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 EEA.

Figure 2 summarises the four types of regression and for each one, identifies some potential policy strategies to lessen its impact. Given the overlaps between the four types of regression strategy (see above), it may be prudent to aim for a combination of different responses within each quadrant which together, build on and support one another.

**Figure 2:** Limiting policy regression: potential policy strategies

	Low visibility	High visibility
No regression decision	<p><b>Regression by default</b>  <i>Ensure existing standards are regularly updated</i></p> <p><i>Evidence-based system to check the 'fitness' of all policies</i></p> <p><i>Regular, UK wide reporting on policy performance</i></p>	<p><b>Symbolic regression</b>  <i>Formulate and adopt a cross-UK strategy of Better Environmental Regulation</i></p> <p><i>Commit to regular monitoring and external reporting</i></p>
Active regression decision	<p><b>Regression by shifting arenas</b>  <i>Ensure a four nation commitment to maintain standards</i></p> <p><i>Adopt strong common frameworks (with non-regression)</i></p>	<p><b>Active regression</b>  <i>Strong and enforceable non-regression</i>  <i>Clear commitment to progression.</i></p> <p><i>Regular, UK wide reporting and parliamentary scrutiny</i></p>

# 7. In which sub-areas of UK environmental policy is regression more likely to occur?

One way to answer this question is to examine the list of ten policies that the EU expressly mentions in the draft text of its trade deal with the UK (in the draft trade deal – see above). Presumably it has grouped them together because it perceives them to be at the greatest risk. It is noteworthy that UK's commitment to implementing these policies in Northern Ireland (as part of the implementation of the Withdrawal Agreement) is already being questioned by the EU.

A second way is to explore the areas of EU policy that the UK struggled to implement when it was a Member State – and thus may be perceived as being prime candidates for regression. In general, the UK had a relatively good compliance record and rarely appeared before the European Court of Justice (CJEU). However, a disproportionate number of the rules that the UK struggled to apply related to environmental matters. In total, around 34 environmental cases against the UK were brought before the CJEU between 1973 and 2016. Amongst these 34 cases, the vast majority (30) culminated in a judgment partially or wholly against the UK (Jordan and Moore 2018a). Crucially, all these cases related to 'behind the border' issues such as water quality, environmental assessment, waste and land use planning, *not* the trade in environmentally relevant goods such as cars, chemicals and waste (which businesses tended to prioritise in order to secure access to the single market). It is also telling that the only occasion on which the UK was referred to the CJEU for persistent non-compliance (leading eventually to the payment of fines) related to water quality (the Whitburn Pumping Station), in January 2019.

A third way is to recall which EU laws attracted the most vocal criticism from UK Ministers in the past. Aside from those that culminated in enforcement action against the UK by the EU (see above), the nature directives stand out as having attracted particularly consistent criticism (see page 18).

# 8. Conclusions

## **The environment is politically important**

It is striking that almost four years after the EU Referendum during which environmental issues were barely mentioned, the eventual form that Brexit takes will hinge on the ability of the EU and the UK to agree on existing and future rules relating to the environment. *In the last four years, the environment has therefore shifted from being effectively side-lined in the referendum to being a ‘make or break’ issue (Jozepa, et al. 2020: 5).*

## **Level playing fields and policy regression are politically salient – and intimately interconnected**

Level playing fields and regression are complex and interconnected concepts which regularly dominate trade talks. Even in one policy sector – the environment, *regression is potentially multi-dimensional encompassing both the legal wording of trade deals (‘non regression clauses’), as well as the administrative and parliamentary systems that implement and oversee them.* This explains why EU-UK talks on things that are ostensibly quite technical – namely regulatory standards – have become embroiled in much more politicised matters such as enforcement, dispute resolution and regulatory oversight.

*There were also likely to be aspects of the level playing field debate that the EU and the UK would disagree upon. But at present, the two sides disagree on a lot; in fact they do not even employ the same terminology (the EU constantly refers to the level playing field; the UK refers only to ‘open and fair competition’ (Jozepa, et al. 2020: 7-8).* Section XIV of the Political Declaration signed by Prime Minister Johnson sought to bridge these differences by referring to the “Level Playing Field for Open and Fair Competition”.

## **The EU and UK have expressed their policy preferences in different ways**

*On specific matters, there are notable differences in how much detail each side is willing to offer.* We find that the EU has been consistently specific in its demands to maintain the current level playing field. It wants detailed, binding and enforceable commitments to the current *level playing field and non-regression* inserted into the text of the final agreement. The UK has said that it does not intend to regress – although without using the terms non-regression and the level playing field – but it has not been prepared to make any legal commitment to that effect.

Interestingly, the EU has raised the possibility of *policy progression*; in fact it has proposed that both sides formally commit to progress. The UK has made no formal, mutually enforceable commitment to that effect.

## **Although neither side has explicitly stated that it wants to regress, some areas of UK policy have traditionally been at greater risk**

Crucially, there is scope for agreement because *neither side has publicly stated that it wants to regress.* Moreover neither side appears to want the existing, very direct form of dynamic alignment (akin to EU membership) in which they move in lock step, although the EU would prefer both sides to consider adopting an indirect form (see above).

However, there is mistrust on both sides. In the UK, *experience suggests that policy regression is more likely to occur ‘behind the border’ in policy areas such as water quality, environmental assessment, waste and land use planning.* It is likely to afflict the trade in environmentally

relevant goods such as cars, chemicals and waste because businesses themselves tend to prioritize alignment with such rules in order to maintain smoother access to the EU's single market. *The EU's nature directives have attracted a lot of political criticism in the past and are likely to be early targets* if the UK Government eventually decides to engage in active forms of environmental policy regression. These, we suspect, are some of the reasons why the EU is so reluctant to rely solely on a standard non-regression clause to maintain the current level playing field after the transition ends.

### **The debate is essentially about something bigger: the right to choose**

If neither side intends to regress what is the debate actually about? In many ways it is currently about means rather than ends, *namely each side's right to choose (in trade policy terms, their 'regulatory autonomy') what it wishes to do*. For Brexiters, this right to choose ('taking back control') is hugely important. As David Frost has made clear, this right was and for many still is *the overriding aim of Brexit*.

### **There are known policy strategies to limit regression, and they can be implemented**

With that in mind, we have identified four distinct strategies that the UK government can conceivably deploy to regress existing environmental policies – active; default; symbolic; and arena shifting. We have, however, also identified an equal number of non-regression strategies that UK Governments can choose to implement to reduce the probability of regression occurring in the future.

Given the overlaps between the four types of regression strategy (see above), we suggested that *it may be prudent to aim for a combination of*

*non-regression strategies within each quadrant which together, build on and support one another*. Crucially, as a non-member state the UK enjoys the full regulatory autonomy to implement whichever responses it wishes to. It does not need to wait for the EU to act first. And it can implement them with an EU trade deal or without one (i.e. in a 'no-deal' situation). Finally, the *policy non-regression strategies we have identified are 'brexit-neutral' – i.e. they do not rely on the specific nature of the future relationship. They can even be implemented domestically in a 'no-deal' scenario in which the EU and the UK decide to trade on WTO terms*.

Of course in all trade negotiations, many issues are on the table, not just environmental ones. In this research paper we have only explored the environmental dimensions. The EU is adamant that it will only consider them as part of a package alongside state aid and workers' rights etc. (Jozepa, et al. 2020: 19). The precise nature of the eventual package will be the outcome of a complex negotiation which may not in the end deliver a final deal, leading to a 'no deal'.

### **EU-UK trade talks will not end the debate about level playing fields: it will keep re-appearing**

*As the endgame of the talks rapidly approach two other important dimensions will become more salient, particularly in the UK and irrespective of the final outcome (i.e. deal vs no deal):*

- *An internal dimension – devolution: amongst the gamut of issues that are wrapped up in the debate about the level playing field, the environment stands out as being the most devolved. In the UK, many areas of environmental policy (agriculture, fisheries and the environment) were formally devolved to the home nations in the late 1990s. Outside the EU (and absent new common frameworks),*



the four nations arguably have even greater leeway to regress and/or progress policy than they did before, thus potentially disrupting the internal level playing within the UK (Jozepa *et al.*, 2020: 47). It would be rather ironic if the UK government in London extricated itself from an ongoing debate with the EU about the level playing field, only to trigger a new debate about it amongst the four nations of the UK.

- *An external dimension – trade negotiations with the rest of the world:* trade negotiations always occur in a goldfish bowl. The same underlying issues about alignment will arise as the UK seeks to forge new trading arrangements with other trading partners. As the UK negotiates with the EU on level playing field issues, other potential trading partners will be watching closely and re-calibrating their expectations accordingly. When negotiations begin with countries with lower environmental standards, the initial negotiating positions are likely to be reversed – with the UK voicing fears about being undercut and insisting on a level playing field.

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