

Briefing 8: EU's Level Playing Field and Sustainable Development



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Executive Summary

The present paper examines the practice of the EU regarding the level playing field and sustainable development. It seeks to identify this initiative and its relation to the promotion of sustainable development within and outside of the European Union. In this regard, the paper introduces certain recent or upcoming legislative actions of the European Commission in the field of environmental regulation and the EU's practice in Preferential Trade Agreements. In a nutshell, the EU seeks to promote sustainable development through market-based instruments that allocate the regulatory burden on products or producers originating outside of the European Union, as a way to ensure the competitive equality and environmental protection.

Introduction

“Without a level playing field on environment, labour, taxation and state aid, you cannot have the highest quality access to the world's largest single market.”¹

In its 2021 Trade Policy Review, the European Commission introduced its agenda for an open, sustainable and assertive trade policy. Amongst the policy goals outlined, the commission emphasized the need for trade policy to support an open strategic autonomy and ensure a level playing field. The latter constitutes a concept that has gained increasing prominence in the economic and trade policy of the European Union (‘EU’) in the recent years. This brief takes a closer look at the role that the concept plays in EU policy and investigates its link to questions of sustainable development.

To date, the EU has not provided an official definition of the term ‘level playing field’. It is generally perceived that the EU uses this term when referring to *“a set of common rules and standards that prevent businesses in one country gaining a competitive advantage over those operating in other countries.”*² The Organization for Economic Cooperation and Development (‘OECD’) characterizes it similarly: *“in global trade terms [the level playing field] means that all countries and firms compete on an equal footing to offer consumers everywhere the widest possible choice and the best value for money.”*³ At its core, therefore, the concept describes a trade policy that seeks to protect *“genuine competitive advantages and promotes open and fair trade.”*⁴

This resonates with comments made by the EU Commissioner on the International Market during the adoption of the recent White Paper on Foreign Subsidies: *“The level playing field in the Single market is at the heart of this initiative and will help our companies operate and compete globally and thus promote the EU's open strategic*

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¹ ‘President von der Leyen on the Future EU-UK Partnership’ (European Commission - European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_3> accessed 29 December 2020.

² ‘Brexit: What Is a Level Playing Field?’ *BBC News* (6 September 2020) <<https://www.bbc.com/news/51180282>> accessed 15 November 2020.

³ ‘Levelling the Playing Field - OECD’ <<https://www.oecd.org/trade/topics/levelling-the-playing-field/>> accessed 16 November 2020.

⁴ *ibid.*

autonomy.⁵ Similarly, the Commission in its Trade Policy Review on an Open, Sustainable and Assertive Trade policy, highlighted the need for “ensuring the principle of “competitive neutrality” and promoting a level playing field.”⁶

In a nutshell, the level playing field is therefore primarily a trade policy concept. It operates within the general theoretical conceptions of T. Friedman, who argued that globalization and technological developments are “flattening” the world, enthusiastically welcoming these developments.⁷ However, it seems that the EU’s use of the concept goes far and beyond, perhaps in accordance with the critics of Friedman, such as J. Stiglitz,⁸ who posit that the present state of globalization has not resulted in a fully flattened world. This is not limited to a strictly trade policy analysis since the EU has started to recognize that other major policy areas are encompassed in their pursuit of level playing field. For example, the latest EU proposal for its post Brexit relations with UK (before the final agreed document),⁹ provided for a whole Title on Level Playing field and sustainability (Title III).¹⁰

The EU proposes that the level playing field should not be limited to removing traditional and obvious barriers and measures addressed in trade and investment relations. Rather, it seeks to enrich the idea of level playing field with obligations towards sustainable development. Hence, it seems that the level playing field is not strictly an economic concept. However, a major incentive towards introducing such harmonized standards of environmental or labor protection has also a deeply rooted economic rationale.

One of the major concerns that accompany trade liberalization is the fact the competitive advantages that arise through the reduction of tariffs and the further market access, may be distorted due to different regulatory burdens or governmental intervention.¹¹ Thus, a level playing field requires also a regulatory ‘field’ where each producer, product, services provider, or services be subject non-discriminatorily to the same regulatory burden. This is expected by EU, to result in upwards harmonization of environmental and labor standards and leads to improved conditions, while also fostering economic opportunities for market actors since they will operate under the same conditions.

The EU has, thus, concluded that the traditional understanding of trade liberalization at least as settled during the Uruguay Round of Negotiations with the establishment of the World Trade Organization (‘WTO’), is not enough to secure sustainable growth and constitutes, also, a threat to the balance that the EU legal order seeks to establish within the EU common market. The EU’s is therefore increasingly conditioning market access to the common market on various prerequisites to ensure a level playing field. These prerequisites become increasingly intense as the non-EU producer or services provider gains more market access or when a non-EU country achieves further integration and access to the EU common market. This is evinced by the free trade policy of EU as well as its policy regarding Association Agreements with countries seeking to enter the EU.¹²

In the following two sections, we will examine certain examples of EU’s practice in its pursuit of level playing field regarding its environmental regulation and its Preferential Trade Agreements.

⁵ Commission’s White Paper on foreign subsidies 2020.

⁶ EU COM (2021), Trade Policy Review - An Open, Sustainable and Assertive Trade Policy. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions

⁷ Thomas L. Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (Further updated and expanded; release 30, Picador [u.a.] 2007).

⁸ Joseph E. Stiglitz, *Making Globalization Work* (1st ed, WW Norton & Co 2006).

⁹ Draft text of the Agreement on the New Partnership with the United Kingdom 2020.

¹⁰ Eg. Article LPFS 1.1.

¹¹ Gary P. Sampson, *The WTO and Sustainable Development* (United Nations University 2005) 55–77; James E. Anderson, Geoffrey J. Bannister and J. Peter Neary, ‘Domestic Distortions and International Trade’ (1995) 36 *International Economic Review* 139; Richard Baldwin and Frédéric Robert-Nicoud, ‘A Simple Model of the Juggernaut Effect of Trade Liberalisation’ (2015) 143 *International Economics* 70; Dennis Kolcava, Quynh Nguyen and Thomas Bernauer, ‘Does Trade Liberalization Lead to Environmental Burden Shifting in the Global Economy?’ (2019) 163 *Ecological Economics* 98; Michael Trebilcock and Robert Howse, ‘Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics’ (1998) 6 *European Journal of Law and Economics* 5.

¹² Jan Zielonka, ‘Europe as a Global Actor: Empire by Example?’ (2008) 84 *International Affairs* 471, 477.

Level Playing Field in EU Environmental Regulations

The examples examined here are the recent legislative proposal of the European Commission on carbon border adjustment mechanism and the proposal for revision of Directive 2003/96 which regulates taxation of energy products and electricity.

Regarding the former, in June 2021 the European Commission is expected to unveil its full proposal for a carbon border adjustment mechanism, designed to protect the EU against distortion of competition and the risk of carbon leakage. The four objectives of the scheme will be “(1) *Limiting emissions leakage*; (2) *Protecting against reduced competitiveness of domestic industries*; (3) *Incentivising foreign trade partners and foreign producers to adopt measures comparable/ equivalent to the EU’s*; and (4) *Yielding revenue that can be used to fund investments in clean technology innovation and infrastructure modernisation or as international climate finance.*”¹³

The EU hopes to achieve these goals by making it more expensive to import carbon-intensive products from third-parties through the imposition of a carbon tax at the borders. The tax will depend on the carbon intensity of the production method of the product as it shall be developed by the EU mainly through benchmark values. Many details of the scheme have not yet been published or finalized; however, it does exemplify EU’s policy regarding level playing in environmental regulation and sustainable development. The goal of carbon neutrality is to be achieved through market-based instruments.

Regarding the latter, the EU has placed its commitment to revise the Directive 2003/96 on taxation of energy products and electricity.¹⁴ Its purpose is to align “*taxation of energy products and electricity with EU energy and climate policies with a view to contributing to the EU 2030 targets and climate neutrality by 2050 in the context of the European Green Deal*” and preserve “*the EU internal market by updating the scope and the structure of rates as well as by rationalising the use of optional tax exemptions and reductions by Member States.*”

In its analysis, the European Commission considered that such measures “*strengthen the level playing field across the EU internal market while contributing to the climate and energy policy goals of the EU.*”

The basis of this new proposal is to introduce a distinction between CO₂-related taxation and general energy consumption taxation. The first type of taxation links CO₂- emissions attributable to the consumption of the products concerned, while the latter links taxation to the energy content of the products.¹⁵ It is evident that the first instance, i.e. attribution of CO₂ emissions,¹⁶ seek to reach extra-European activities since global value chains constitute the norm in the production of goods and the provision of services. The idea here is similar to border-tax adjustment where products are taxed based on their attributed CO₂ emissions produced during their production process. This way EU to introduce carbon intensity as the basis of competition between products, seeking thus to incentivise greener production methods within the EU.

Level Playing Field in EU Preferential Trade Agreements

Aside from EU Regulation, the EU promotes the level playing field through Preferential Trade Agreements. This is mostly exemplified in the recent EU-UK Trade and Cooperation Agreement (“TCA”). In particular in, TITLE XI, called ‘Level Playing Field for Open and Fair Competition and Sustainable Development’, the Agreement sets out the fundamental rules regarding level playing field and sustainable development.

In particular, Article 1.1, titled ‘Principles and objectives’, provides:

“1. *The Parties recognise that trade and investment between the Union and the United Kingdom under the terms set out in this Agreement require conditions that ensure a level playing field for open and fair competition between the Parties and that ensure that trade and investment take place in a manner conducive to sustainable development.*”

¹³ European Roundtable on Climate Change and Sustainable Transition, “Border Carbon Adjustments in the EU Issues and Options” (September 30, 2020). Available at: <https://ercst.org/border-carbon-adjustments-in-the-eu-issues-and-options/>

¹⁴ Proposal Revision of Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity

¹⁵ Proposal Revision of Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity

¹⁶ More details on the exact procedure and apportionment: COMMISSION DECISION of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council

2. *The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to promote the development of international trade and investment in a way that contributes to the objective of sustainable development.*
3. *Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050.*
4. *The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title.”*

In light of these principles the Agreement sets out the particular obligation related to level playing field and sustainability. It extends the scope of the agreement over issues related to: state aid control, competition, state-owned enterprises, taxation, labour and social protection, environment and health, climate change and other instruments. In this regard, the Agreement sets out different obligations between the parties regarding cooperation, harmonization, non-regression of standards, monitoring and enforcement. It remains to be seen though to what extent such an elaborate treaty language will have the impact in the promotion of sustainable development. The focal points are expected to be the non-regression obligations and the commitments to increase future levels of protections, which will set the pace on the future relations between the two parties on sustainable development.

Similar obligations can be found other Preferential Trade Agreements. For instance in the field of environmental protection, such language can be found in the EU-Ukraine Association Agreement which obliges Ukraine in Annex XXXI to Chapter 6 to implement the Kyoto Protocol including all eligibility criteria for fully using the Kyoto mechanisms, develop a long-term action plan for mitigation and adaptation to climate change, and develop and implement long-term measure to reduce greenhouse gases emissions, in order to harmonize with EU environmental law.¹⁷

Conclusion

To make a long story short, the level playing field that the EU seeks to extend beyond its borders constitutes a very ambitious but promising initiative. In 2020, the EU has introduced more instruments related to level playing field such as the White Paper on Foreign Subsidies and the EU-UK Trade and Cooperation Agreement, while in 2021 more proposals are expected to be introduced such as the Carbon Tax Adjustment proposal.

In this regard, the initiative of the EU regarding the level playing field and sustainable development has been met with certain criticism as it remains to be seen whether it can be characterized as a beneficial trade policy that seeks to promote sustainable development goals through economic and trade instruments or it constitutes the nouvelle vague of EU's protectionism.

¹⁷ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3–2137. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29>