Regulating for Globalization

Trade, Labor and EU Law Perspectives

Brexit and Labour Standards at the time of COVID-19 – To Converge or to Diverge, that is the Question*

Jeff Kenner (University of Nottingham) · Monday, May 25th, 2020

As the COVID-19 pandemic engulfs the world, requiring an unprecedented and, as of yet, unforthcoming global response, the idea of Brexit, the sheer self-indulgence and chicanery of Brexit, has quickly become remote from the minds of policy makers and peoples alike. Nevertheless, with negotiations on 'forging a new partnership' between the EU and the UK barely off the ground by mid-March 2020, as Europe went into lockdown, the UK Government has continued to insist that there will be no extension of the standstill post-Brexit transition period beyond the deadline of 31 December 2020 set by the EU-UK Withdrawal Agreement of October 2019. Any mutually agreed decision to extend that deadline must, under the Agreement, be made in matter of weeks, by 1 July 2020, almost certainly before the pandemic is over and there is any return to whatever will count for normal. With world GDP hurtling downwards, businesses shuttered and ever spiralling worker lay-offs and redundancies, Brexiter ideologues seem prepared to test chaos theory to its limit by taking the UK out of the EU's regulatory orbit and into a new age of borders, divergence and economic shock therapy from the beginning of 2021.

In attempting to understand the rationale for this approach, the issue of social and labour standards quickly comes to the fore. If we assume that the UK means what it says, and there is no mutually agreed one-off extension of the transition period for 'up to one or two years' (Article 132 of the Withdrawal Agreement), then there will be less than six months in which to establish whether the UK is prepared to shift its stance and agree to non-retrogression, or what might be described as static alignment, of social and labour standards pertaining in the EU and UK at the end of the transition period. If the UK commits to static alignment to preserve a 'level playing field' (LPF) to prevent undercutting or social dumping, and to similarly maintain common standards in the areas of environment, climate change, tax and state aids, it may yet confound sceptics and facilitate an agreement with the EU within the timeframe. Alternatively, if, notwithstanding its geographical proximity and interdependence with the EU, the UK chooses a path of labour market and social deregulation and divergence, pursuing a Singapore-type economic model, through a combination of ideology and a desire to secure a trade agreement with the United States, it could be hugely disruptive to the Single Market and, potentially, to the future of the European Social Model. Such a 'no deal' scenario, or 'disorderly Brexit' would require the EU to impose its Common Customs Tariff on UK goods under the rules of the World Trade Organisation. This would lead to immense short to medium-term economic problems for the UK – which exports 45% of its goods to the EU (House of Commons Library, 2018) – with a predicted fall of 5.5% in the country's GDP and a doubling of unemployment to 7% (Bank of England, September 2019). Such problems will be magnified by COVID-19 and its aftermath. EU Member States, struggling to recover from the

pandemic, would face a second debilitating wave of disruption as the UK, which imports 53% of its goods from the Union, would impose its own tariffs. The EU's response to such a scenario would be a supreme test of its commitment to uphold Social Europe and its unity in a period when European solidarity is likely to be in short supply following the failure to burden share in response to the socio-economic crisis caused by COVID-19.

The UK left the EU on 31 January 2020. It was a unique moment. For the first time a Member State had departed from the Union and become a 'third country'. Three and a half years had elapsed from the tightly fought referendum and, at the second attempt, the parties had settled the bare bones of their divorce with a revised version of the Protocol on Ireland and Northern Ireland annexed to the Withdrawal Agreement. Northern Ireland, territorially part of the UK but with its land border with the EU and its history of conflict, is tied by the Protocol, potentially indefinitely, to EU rules on customs and related areas of regulation considered necessary to avoid a border on the island of Ireland and preserve peace. The revised Protocol does not, however, address the issue of labour standards, unlike the original version which contained an Annex committing the parties, inter alia, to non-retrogression of the labour standards pertaining at the end of the transition period. Instead the issue is now left to the future relationship negotiations discussed below.

Under Article 50 of the Treaty on European Union the parties were required, almost as an afterthought, to take account of the 'framework' of their future relationship during the Brexit negotiations. This loose requirement was met by the issuance of a joint non-binding Political Declaration accompanying the Withdrawal Agreement. The Political Declaration loosely commits the parties to establish 'the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core' (para. 3). It is perhaps reassuring that the Political Declaration states that the parties are determined to safeguard 'high standards of free and fair trade and workers' rights' (para. 2). It must be understood, however, that back in October 2019 the parties were so focused on finding a solution to avoiding a regulatory border on the island of Ireland that there was little time spent on the Political Declaration and much of it, including this worker-friendly language, remained untouched from the previous version negotiated between the European Commission and the Government of the UK's former Prime Minister, Theresa May, in November 2018. With the ascendancy of Boris Johnson to the position of Leader of the Conservative Party and UK Prime Minister in July 2019, followed by a resounding election victory five months later, the picture now looks very different. On the one hand, May had trumpeted close alignment with EU labour standards, promising that workers' rights would be 'fully protected and maintained' post-Brexit at least at EU levels or even building on them (Lancaster House speech, January 2017). In March 2019, following the adoption of the first version of the Withdrawal Agreement, May introduced proposals to safeguard EU-derived labour rights and require a report to the UK Parliament on any new workers' rights introduced by the EU, raising the remote prospect of dynamic alignment with EU labour standards to close off the prospect of social dumping. However, May ultimately failed to navigate the Withdrawal Agreement through the UK Parliament and consequentially resigned from the Conservative Party leadership. Following his General Election victory, Johnson, on the other hand, now with a majority in Parliament, promptly withdrew May's proposals on labour rights from the legislation to implement the Withdrawal Agreement. Instead the Government announced that there would be a new Employment Bill but, to date, it has not been published and its ambitions are unclear (House of Commons Library, 20 December 2019).

Looking forward, the Political Declaration declares that the proposed Free Trade Agreement (FTA) 'will be underpinned by provisions ensuring a level playing field for open and fair competition' (para. 17). More bluntly, European Commission President, Ursula von der Leyen, has made clear

that an FTA is contingent upon an LPF guarantee of ‘zero tariffs, zero quotas, zero dumping’ (London School of Economics speech, 8 January 2020). As regards labour standards, the Political Declaration enunciated that LPF provisions must encompass ‘robust commitments’ to ‘uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in … social and employment standards … and include appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement’ (para. 77, emphasis added). Although the ILO is not mentioned, Union and international standards are the reference point for the LPF and, moreover, the parties are committed to ‘promote adherence to and effective implementation of internationally agreed principles and rules’ (para. 77).

There has, however, been much water flowing under the bridge since the Political Declaration was issued. When the ink was barely dry on the document, a leaked UK Government paper revealed its view that the ‘interpretation of these [LPF] commitments will be very different’ and binding arbitration was ‘inappropriate’ (Financial Times, 25 October 2019). In response, the UK stated that it had ‘no intention of lowering the standards of workers’ rights’. Following the election, however, Johnson’s Government has indicated that it regards such commitments as merely rhetorical and not conditional for an FTA. This was borne out in February 2020 when the UK published its approach to the negotiations (Command Paper 211). Its bottom line is that it will not negotiate any arrangement ‘in which the UK does not have control of its own laws and political life’ (para. 5). The UK Government has seized on the suggestion by the EU’s chief negotiator, Michel Barnier, that the UK’s desire post-referendum to leave the EU Customs Union and Single Market would mean that the EU would look to an FTA similar to the agreement between the EU and Canada (CETA). Barnier presented an illustrative single slide pointing to the Canada option at a very different stage of the process in December 2017. For the UK, the reference to CETA presents an opportunity to suggest that labour standards should merely be promotional. In its negotiating strategy document, the UK notes that: ‘In line with precedent, such as CETA, the Agreement should recognise the right of each party to set its own labour priorities and adopt or modify its labour laws’ (para. 76). No reference is made to an LPF. At most the UK is prepared to agree to ‘reciprocal commitments not to weaken or reduce the level of protection afforded by labour law and standards in order to encourage trade and investment’ but these provisions ‘should not be subject to the Agreement’s dispute resolution mechanism’ (paras. 76-77). From this it can be discerned that the UK wishes to self-regulate its labour standards and could determine that any prospective domestic diminution of labour law might be unconnected with trade relations with the EU. In return, the EU would be expected to accept the UK’s commitment to reaffirm existing ILO principles and rights, which is a rather limited assurance given that the UK has ratified only 88 ILO Conventions, which includes the eight ‘core’ conventions but is significantly lower than several EU Member States including Spain, 133, France, 127 and Italy, 113 (ILO, NORMLEX, April 2020).

Not surprisingly, key Member States, notably France and Belgium, have demanded stricter LPF provisions in response to the UK’s negative messaging in order to prevent undercutting of labour standards even if it means that no agreement is concluded in 2020 (Financial Times, 23 February 2020). The EU’s ‘Negotiating Directives’ (Council of the EU, 25 February 2020), known as the ‘negotiating mandate’, set out the parameters for the Commission to negotiate with the UK. There has been a degree of internal compromise but, nonetheless, a marked toughening of the language used in the Political Declaration. Part 15 of the Negotiating Directives sets out a series of LPF conditions, specifically that ‘the envisaged agreement should uphold common high standards, and corresponding high standards over time with Union standards as a reference point, in the areas of [inter alia] social and employment standards’ (para. 94, emphasis added). Thus, the position of the

EU has shifted from static alignment at the end of transition to a form of dynamic alignment without necessarily requiring full convergence. Turning to enforcement mechanisms, the document repeats the language in the Political Declaration on effective domestic implementation, enforcement and dispute settlement but adds a reference to the need for 'appropriate remedies' and seeks to reserve a power for the Union 'to apply autonomous, including interim, measures to react quickly to disruptions of the equal conditions of competition in relevant areas, with Union standards as a reference point' (para. 94). Such Union intervention would be anathema to the UK which makes clear in its negotiating document that there should be 'no role for the Court of Justice' in the governance arrangements (para. 6).

The EU's LPF proposals identify the following areas of labour and social protection for alignment to the common standards applicable within the EU and the UK at the end of the transition period: 'fundamental rights at work; occupational health and safety, including the precautionary principle; fair working conditions and employment standards; and information, consultation and rights at company level and restructuring' and to 'protect and promote social dialogue' (para. 101). In a further sting in the tail for the UK, and possibly also to prevent backsliding within the EU, the mandate suggests that if the parties increase their respective levels of social and labour protection beyond these commitments the partnership 'should prevent them from lowering those additional levels in order to encourage trade and investment' (para. 110).
Moreover, building on the parties' commitment to ensure sustainable development in the Political Declaration, the EU proposes that the partnership 'should include provisions on adherence to and effective implementation of relevant internationally agreed principles and rules' including ILO conventions and the European Social Charter (ESC) of the Council of Europe (para. 109). The UK remains a member of the Council of Europe and has ratified the ESC. Finally, there would be a system of monitoring the implementation of commitments and the 'social and environmental impacts' of the partnership (para. 113).

On the face of it the differences between the parties are widening and could soon be irreconcilable. During the hiatus before negotiations resumed on 20 April, the Commission published a 440-page 'Draft Treaty' putting its negotiating directives into concrete form (UKTF (2020) 14). Following an inconsequential second round of negotiations on 20-24 April, a third round commenced on 11-15 May with all the main issues apparently unresolved. As the parties adapt to Zoom, Teams or other newly learned technologies, or even face to face, there will have to be compromises on both sides to reach agreement and an extraordinary amount of goodwill. Moreover, labour standards to ensure an LPF is only one of several issues, including fishing, Gibraltar and state aids, that threaten to wreck the negotiations. The position has been further complicated by a statement by the key UK's ministerial negotiator, Michael Gove, that the UK is prepared to give up on tariff free and quota free access to the Single Market if it means committing to the EU's demands for an LPF (The Independent, 5 May 2020).
Unless there is an agreement to extend the transition period at a key virtual EU-UK summit in June, which some commentators expect but is not a given, a crunch point will be reached in the autumn of 2020 if not earlier. It is possible that there will be a fudged commitment to an LPF based on static alignment with enforcement only by the UK authorities subject to limited mechanisms for independent dispute settlement. For the EU this may be enough to move on from Brexit and concentrate fully on how to recover from the disaster of COVID-19. The toughened-up provisions having been presented in the negotiating mandate can be climbed down from assuming that this can be levelled with all Member States and the European Parliament. For the UK it may be much more difficult. It would have to accept the social acquis and be indefinitely tied to converged labour standards with, at most, gradual divergence over time if, somewhat optimistically, it is

assumed that workers' rights are considerably enhanced at EU-level in the next decade or, perhaps more likely, developed through the case law of the Court of Justice. The problem with concluding that there will inevitably be a fudged convergence is that the UK is temperamentally inclined towards having the sovereign right to diverge its labour standards even if it chooses not to exercise this divergence in practice for domestic political reasons. It wants to be 'an economic competitor on [the EU's] own doorstep' as Chancellor Angela Merkel has warned the German Parliament (Politico, 11 September 2019). For Boris Johnson, at the zenith of his political power, the whole point of Brexit is to 'take advantage' of the 'freedoms' including what he euphemistically describes as 'better regulation' for the sectors in which the UK has a commercial advantage (The Guardian, 23 September 2019). The EU is faced with a difficult choice. It can negotiate a 'partnership' which gives the UK enough latitude to accept the status quo in the interim but slowly diverge from common labour standards without effective EU oversight or remedial powers, or it can accept the likelihood that the UK will go its own way towards potentially more rapid divergence which, even if it does not create a 'Singapore on the Thames', will mean that there will almost certainly be no negotiable FTA in the short to medium-term. The economic and social pain that this choice will entail, on both sides of the English Channel, may be delayed by an extension of the transition period but it probably cannot be avoided. For the EU, the choice to accept divergence may be the lesser evil in the longer run. It would provide an opportunity to show that more advanced social and labour standards offer a better path to economic prosperity and social cohesion in a more fragmented world. For the UK, it may advance the realisation of the stark reality of its isolation and the high economic and social price to be paid for alternative 'deals' with any of the United States, China or Russia. Over time the negative effects of divergence from EU standards could bring about the change in British mindset that is needed to return to the regulatory orbit of Social Europe, a move which could still fall short of re-joining the Union. For the time being, for both sides, whether to maintain convergence, be it static or dynamic, or embrace divergence, is an urgent question that must be answered soon.

*This is the English version of an editorial in *Dirriti Lavore Mercati*, 2-2020, *'Brexit e tutele del lavoro al tempo del Covid-19: convergenza o divergenza, questo è il problema'*.

The Regulating for Globalization Blog is closely following the impact of COVID-19 on the labour, trade and European law communities, both practically and substantively. We wish our global readers continued health and success during this difficult time. All relevant coverage can be found here.

This entry was posted on Monday, May 25th, 2020 at 2:00 pm and is filed under Brexit, Covid-19,

EU, Labor Law, UK

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.