

# Laying the foundations for a level playing field – ETUC statement on the future EU-UK partnership

Statement presented at the Executive Committee of 7 and 8 March 2018

## Current situation

In late January the Council of General Affairs adopted the EU guidelines to negotiate a transition period<sup>1</sup> as part of the Withdrawal Agreement. The guidelines require the UK to remain in the single market and customs union, paying into the budget and being covered by the full EU acquis during the transition – including changes to EU law and the jurisdiction of the CJEU during that period, which is set to end in December 2020. This is consistent with the European Council's commitment to prevent social, environmental and tax dumping once the UK leaves the EU.

The ETUC welcomes<sup>2</sup> these additional guidelines, it is essential that the UK stays in the single market and customs union until a new relationship is agreed. This is in the interests of working people in the EU and the UK. Following existing and new EU law it is the only way to guarantee a level playing field especially on workers' rights.

The ETUC welcomes the publication of the EU Council draft guidelines on the future relationship that will be discussed at the next EU Council meeting on 22/23 March 2018<sup>3</sup>. We agree with the draft guidelines on the following point: "Given the UK's geographic proximity and economic interdependence with the EU27, the future relationship will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level playing field. The aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of current levels of protection with respect to competition and state aid, tax, social, environment and regulatory measures and practices. This will require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies, that are all commensurate with the depth and breadth of the EU-UK economic connectedness."

The ETUC calls the guidelines also to require UK legislation to continue to keep pace with the evolution of the EU social acquis **by including a non-regression clause. This would be important** to avoid social dumping between the UK and the EU in its future relationship and to ensure British workers do not become second-class citizens.

## Avoiding a race to the bottom on workers' rights across Europe after Brexit

The ETUC is deeply concerned that if labour rights are not properly upheld after Brexit, it will not only damage workers in the UK but will have possible devastating effects on workers' rights in EU27/EEA30.

If in the future EU-UK partnership this issue is not seriously addressed, it could possibly trigger a race to the bottom and social dumping and thus, damage workers' rights across Europe.

<sup>1</sup> <http://www.consilium.europa.eu/en/press/press-releases/2018/01/29/brexit-council-article-50-adopts-negotiating-directives-on-the-transition-period/>

<sup>2</sup> <https://www.etuc.org/press/etuc-brexit-transition-guidelines#.WocAeKinHcs>

<sup>3</sup> <https://q8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/European-council-Art.50-23-March-2018-Draft-Guidelines-1.pdf>

Should the UK get duty free access for goods and services to the EU27/EEA30 market after Brexit without any social conditionalities, Britain could pursue a competitive strategy based on lower employment standards, well beyond EU minimum requirements<sup>4</sup>. A deregulatory drive could potentially reduce the costs of operating businesses in the UK to the detriment of companies in the rest of the EU.

It is therefore possible that those EU27/EEA30 countries which enforce standards above the EU minimum requirements, could be put at disadvantage. Employment regulations may be changed following pressures from the countries that would see certain sectors of their labour markets threatened by a potential UK undercutting economic strategy. Therefore, EU27/EEA30 countries whose employment standards – on various dimensions – are currently higher than the EU/EEA30 minimum threshold would have an incentive to decrease them. In the absence of assurances that the UK will retain current employment standards, EU countries could succumb to a competition with the UK at the low end of the labour market as well as at the higher end. Therefore, it is important to prevent the UK from encouraging trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards after Brexit. The future EU-UK partnership should ensure that the UK shall not waive or otherwise or otherwise derogate from, its labour law and standards, to encourage trade or attract foreign investment.

### **Laying the foundations for a level playing field**

In December 2017 the ETUC set out its tests to be applied to any proposed future relationship between the EU and the UK after the transitional arrangement<sup>5</sup>. The ETUC called for a level playing field on workers' rights to be maintained and for frictionless, tariff-free and barrier-free trade in goods and services, as well as allowing movement of workers while protecting them from exploitation, unfair treatment and undercutting and guaranteeing their right to remain. The ETUC also called for a dispute settlement mechanism based on the jurisdiction of the CJEU and for the protection of the Good Friday Agreement on the island of Ireland. In this regard we welcome the draft motion for a resolution on the framework of the future EU-UK relationship of the European Parliament<sup>6</sup>, which says that with the view to preserving the 1998 Good Friday Agreement in all its parts and the rights of people in Northern Ireland, the UK must keep to its commitments to ensure that there is no hardening of the border on the island of Ireland, either by means of detailed proposals to be put forward in negotiations on the framework of the future EU-UK relationship, by specific solutions for Northern Ireland or, by continued regulatory alignment with the EU *acquis*. **The ETUC also called to grant family reunification rights, establishing clear procedural guarantees. Family reunification helps to create socio-cultural stability and to promote economic and social cohesion – a fundamental EU objective. Workers also need guarantees that their pension entitlements they have built up will not be endangered because of Brexit.**

Based on those tests the ETUC remains of the view that the best option for working people would be for the UK to accede to EFTA and the European Economic Area (EEA) Agreement and continuing being part of the EU customs union in the future. However, given the red lines set out by the UK government, while that is effectively what the transition period would look like, the EEA option may not be possible in the longer term.

The ETUC will continue to call for all options to remain on the table and calls to set out clear terms for a level playing field in the future partnership.

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<sup>4</sup> See Annex I for examples of pressure to weaken labour protections thus giving unfair competitive advantage to the UK vis a vis the EU27.

<sup>5</sup> <https://www.etuc.org/documents/etuc-resolution-future-partnership-between-uk-and-eu#.WocFhKinHcs>

<sup>6</sup> [https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/PARL-Draft\\_Resolution\\_4\\_0503-1930.pdf](https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/03/PARL-Draft_Resolution_4_0503-1930.pdf)

## **Why the “Free trade agreement approach” will not work**

The ETUC is particularly concerned about the current British position to seek a free trade agreement (FTA) with the EU, instead of full membership of the single market. The ETUC has grave concerns on existing EU FTAs with other trading partners that do not allow for a level playing field, particularly on social issues. An FTA between the EU and the UK would not live up to the expectations of workers both in the UK and in the EU27 for the following reasons:

While FTAs negotiated by the EU tend to include a trade and sustainable development chapter, its **labour clauses** usually only require respect of ILO conventions<sup>7</sup>. As stated before, the ETUC does not believe these standards to be enough to prevent the UK from undermining the rights of working people in Britain to obtain an unfair competitive advantage by deregulating (see Annex I for a list of areas where this risk is particularly high). To protect the level playing field and prevent social dumping, the future EU-UK partnership must instead cover the **whole of the EU acquis**: it must demand that the UK protects existing rights via a non-regression clause and keeps pace with new ones via automatic transposition as required in EEA. Only this would protect the rights at work of people in Britain, prevent undermining the rights at work of people across Europe, and, crucially for the safeguarding of the Good Friday Agreement, guarantee regulatory alignment between rights at work in Ireland and Northern Ireland. Failing that, it must contain an undertaking that the UK will approximate its laws to those of the EU as required by the DCFTA with Ukraine, with the difference that this commitment should be binding and subject to enforcement. Moreover, trade and sustainable development chapters are not binding: breaches of this chapter do not lead to **sanctions**. As a minimum, the future EU-UK partnership must include a mechanism to suspend the agreement e.g. reduce market access, if labour commitments are breached. It must also foresee **compensation** and remedial action.

An EU FTA would mostly liberalise **trade in goods**. Given the existing level of intra-EU trade in services<sup>8</sup> it is likely that an FTA only covering goods and with **limited coverage of services** would be detrimental to both the EU and the UK.

Furthermore, a “negative list” approach to liberalise trade in services between the UK and the EU, even coupled with a ‘right to regulate’ clause, as it is the case in all current EU FTAs, would not adequately protect the contracting parties’ **public services** from the risk of liberalisation - there would still be a ‘chilling effect’ on national governments given the risk of private operators already running public services on one side seeking market access in the other.

Given the size of the financial services sector in the UK and the interconnectedness with the EU financial system, great attention must be paid to the way financial services will be covered in the future agreement. This agreement must be consistent with the need for adequate regulation of financial services. Investment protection standards that would threaten existing regulations or the setting up of new strategies of financial regulation must be rejected. Market access rules must not prevent the ability of governments to regulate the size, interconnectedness, or legal form of financial services providers or prevent the ability of governments to prohibit dangerous financial instruments. The use of investor-state arbitration to settle disputes related to financial services and financial regulation must be prohibited.

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<sup>7</sup> See Annex II ETUC resolution December 2017 <https://www.etuc.org/documents/etuc-resolution-future-partnership-between-uk-and-eu#.WocFhKinHcs>

<sup>8</sup> [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Share\\_of\\_EU\\_Member\\_States\\_in\\_international\\_trade\\_in\\_services\\_within\\_the\\_EU\\_\(intra-EU\),\\_2016\\_\(%25\\_of\\_EU-28\\_total\).png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Share_of_EU_Member_States_in_international_trade_in_services_within_the_EU_(intra-EU),_2016_(%25_of_EU-28_total).png)

The ETUC also demands that the future partnership must have the least negative impact on European industry to keep industrial jobs in Europe. This means tariff and barrier free trade, mutual access, full compatibility of safety and environmental regulations and the protection of current workers' rights. This is particularly important for the industrial and manufacturing sectors, which have large and complex supply chains heavily integrated throughout Europe. Existing trade agreements typically include state to state **dispute settlement mechanism**, but increasingly also investor-state arbitration (ISDS, ICS and more recently a Multilateral Investment Court – MIC - is being explored). None of these systems would safeguard the right of individual workers and their unions to seek redress including by being able to rely directly on their rights protected in treaties in domestic courts. Arbitration implies an emphasis on reaching an agreement, which could be political, rather than judicial determination that compensates the worker. Also, the appointment of the arbitration panel becomes a political decision (something MIC seeks to remedy). The ETUC calls for any future dispute settlement mechanism between the UK and the EU in their future partnership to:

- Ensure that individuals (including EU citizens), businesses and other legal persons can rely directly on any rights created by the future partnership agreement, including rights provided for by the EU social acquis, in domestic courts. The terms of the future partnership agreement must have legal effect both in the UK and in the Union. Domestic legislation should be enacted to this effect.
- Provide for either the possibility for individuals or businesses to request that cases can be referred to the CJEU for the interpretation of EU-derived rights or a duty to abide by CJEU case law on those.
- Ensure domestic courts are required to interpret the terms of the future partnership in line with CJEU case law.
- Provide for the imposition of sanctions for breach of the future partnership agreement or of rights provided by the future partnership agreement, including effective remedies for individuals, business and other legal persons whose rights have been breached.

These aspects are particularly important to protect the rights of EU and UK nationals: the commitments undertaken by the UK and the EU in their joint position<sup>9</sup> agreed last December would be meaningless without effective means to enforce them judicially after CJEU jurisdiction in the UK has ceased in the future.

### **Next steps**

On 23 March 2018 the European Council will adopt another set of additional guidelines for a political declaration on the future partnership, which will be appended to the Withdrawal Agreement. While it is not clear what the UK wishes for the future, the EU is preparing to set out the broad outlines of the future partnership and laying down its conditions.

Between April and October, the legal text of the Withdrawal Agreement (including the terms of the transition and a and political declaration on the future) will be negotiated. The aim is for the EU summit of 18-19 October to adopt the negotiated text and put it to the EU Parliament and national legislatures for ratification by March 2019. It is only after the UK has left the EU, and the transition period has started, that negotiations on the terms of the future partnership will be negotiated.

We reiterate our view – set out in the resolution of the ETUC Executive Committee in March 2017 – that, should the UK seek to suspend or revoke its declaration under Article 50 of the Treaty, that should be welcomed by the EU.

We draw the attention to Michel Barnier of our previous resolutions, all of which remain relevant<sup>10</sup>.

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<sup>9</sup> [https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf)

<sup>10</sup> [ETUC Statement on the notification of the UK to withdraw from the European Union; ETUC Resolution on the future partnership between the UK and the EU.](#)

## Annex I:

### **Summary of EU employment standards in the UK that, if removed, create the risk of unfair competitive practices towards EU27 countries**

The EU is looking into areas where the UK could seek to depart from EU standards to gain benefits. A [presentation](#) by the European Commission to representatives of EU governments identified state aid, taxation, environment and labour as the areas where the European Council seeks to prevent unfair competition from the UK. What follows is a review of the major areas of EU derived employment protections that have resulted in greater benefits for working people in the UK and that are at risk post-Brexit. These rights are important not only to British workers but also to EU nationals in the UK and looking to remain there after Brexit.

Since the mid-1970s, EU employment law has played an important role in protecting working people in the UK from exploitation and in combating discrimination. Unlike in many other western EU member states, where domestic social policy and collective bargaining frameworks provide a higher level of protection which exceeds the EU minimum standards, EU social policy has played a central role in raising employment standards in the UK. Indeed, employment rights derived from the EU have also provided a counter-balance against pressure for the UK to adopt a US-style system of employment relations based on flexible working practices, a hire-and-fire culture and the absence of statutory employment rights.

As well as improving standards in EU Member States, EU employment law has reduced the risk of 'social dumping'. In the absence of existing safeguards, it is likely there would have been a 'race to the bottom', with countries seeking to compete based on lower pay and conditions and reduced employment protection.

There is extensive evidence that EU employment, equality and health and safety laws have delivered wide-ranging benefits for working people in the UK. While the Prime Minister has repeatedly claimed workers' rights will be protected and even enhanced after Brexit, recent statements on working time rights by senior Ministers suggest that there are plots to deregulate. The Foreign Minister, in his [speech](#) in mid-February, spoke of a regulatory framework freed from the EU to suit the particular needs of the UK and for the UK to take advantage of Brexit through regulatory divergence for economic gain.

There are also plenty of examples of other stakeholders increasing the pressure on the government to shred workers protections. Earlier in 2017 [Employers' groups](#) and lawyers have also called for weaker employment standards once we leave the EU. The Daily Telegraph is running a campaign to "[Cut EU red tape](#)" as part of the negotiations and has called on the Conservative Party to promise a "bonfire of EU red tape". John Longworth, Chair of Leave Means Leave, published an [article](#) claiming that the EU working time regulations have made UK companies less competitive in world markets as well as taking issue at the Agency Workers Directive.

Lately an unpublished impact assessment of the British government (only recently made available to members of parliament in a reading room) has looked at the competitive advantage of reducing employment protection. The [report concludes](#) "*Leaving the EU could provide the UK with an opportunity to regulate differently across social, environmental, energy, consumer and product standards*". While the estimated gains would be not significant overall, they would be higher in particularly critical areas such as employment, consumer protection and the environment.

Although the British government is unlikely to start a bonfire of all workplace rights immediately, there is a risk that Ministers will adopt a salami slicing approach as soon as the transition period is over - limiting, hollowing out or even removing specific workplace rights which are unpopular with those on the right and some employers' organisations.

British Ministers have pointed to the European Union (Withdrawal) Bill as the vehicle by which EU sourced workplace rights are to be retained in UK law outside of the EU. However, detailed scrutiny of the Bill reveals that it fails to provide any genuine protection for these rights: it does not contain a non-regression clause; the EU Charter of Fundamental Rights is not retained as a principle of EU law which will continue to apply; individuals would no longer be able to bring a case in UK courts on the basis that UK law breaches EU law and won't be able to seek damages from the government; it ends the jurisdiction of the CJEU and empowers Ministers to amend, repeal or weaken retained EU rights without full parliamentary scrutiny.

What follows is a review of the major areas of EU derived employment protections that have resulted in greater benefits for working people in the UK and that are at risk post-Brexit. The list could expand when the EU introduces new initiatives stemming from the European Pillar of Social Rights, such as a directive on transparent and predictable working conditions.

**Key health and safety standards.** The Health and Safety at Work Act predated EU rules. But EU standards have led to the introduction of broad duties on employers to evaluate, avoid and reduce workplace risks. EU Directives have also led to safeguards in high-risk sectors like construction; addressed workplace risks such as musculoskeletal disorders, noise, work at height or with machinery; and provided safeguards for workers, such as new or expectant mothers and young people. The number of worker fatalities in the UK has declined significantly since EU directives were implemented.

**Working time rights:** Although UK workers can opt-out of the maximum 48-hour week, since the Working Time Directive (WTD) was implemented in the UK nearly a million fewer workers are working excessive hours. Around 6 million workers also secured rights to paid holidays, with around 2 million getting paid holiday for the first time, including many low-paid part-time women workers. Thanks to the WTD, many in insecure work, including agency workers, freelancers and those on zero-hours contracts, for the first time secured the right to holiday pay.

In 2014, the UK Department for Business, Innovation and Skills estimated that the recent holiday pay CJEU cases (Stringer and Pereda cases) cost the UK economy in excess of £100 million per year, mostly related to additional absences from work. Clearly that money will be going to workers – but if UK employers don't have to pay, but EU employers are required to there is a potential competitive advantage<sup>11</sup>.

**Maternity and pregnancy rights:** EU law has improved protections for pregnant women and new mothers, including day one rights to unfair dismissal rights and protection from discrimination. Pregnant women have also secured rights to paid time off to attend ante-natal appointments.

**Rights for parents and carers:** Due to the Parental Leave Directive, parents can take up to 18 weeks' unpaid leave to care for a child. 8.3 million working parents qualify for this right in the UK. The right is used most by single parents who find balancing paid work and care most difficult and who are most likely to face barriers to employment. Around one in five single parents rely on this leave each year. The Directive also provides a right to reasonable time off to deal with family or domestic emergencies. This right is used by one in four working parents and three in ten carers each year.

**Equal pay:** Thanks to EU law, women in the UK secured the right to equal pay for work of equal value which is key to tackling the gender pay gap. EU equal pay law also resulted in part-time women workers gaining access to occupational pensions.

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<sup>11</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389676/bis-14-1287-the-impact-of-the-working-time-regulations-on-the-uk-labour-market-a-review-of-evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389676/bis-14-1287-the-impact-of-the-working-time-regulations-on-the-uk-labour-market-a-review-of-evidence.pdf)

Protection from discrimination: The UK had race, sex and disability discrimination laws before the EU required them, but EU law still led to improvements. For example, it led to the removal of the exemption for small businesses to discriminate on grounds of disability and ensured victims of discrimination receive proper compensation. The EU Framework Equal Treatment Directive introduced the first rights equality on grounds of sexual orientation, religion or belief and age in the UK.

Equal treatment rights for part-time, fixed-term and agency workers have created significant benefits for UK workers. It was estimated that around 400,000 employees benefitted from equal treatment rights for part-time workers (around three quarters of whom were women).

In 2000, the UK government estimated that complying with equal treatment rights for part-time workers would amount to £14.7 million per year.

The Fixed Term Employee Regulations led to significant improvements in pay and conditions and better access to occupational pensions for many temporary staff in the UK, particularly in the education sector. Temporary staff are also no longer required to waive their unfair dismissal rights. In 2001, the estimated costs to employers of complying with these regulations would amount to £142-289 million.<sup>12</sup>

The Agency Workers Regulations also led to some agency workers receiving a pay rise and improved holiday entitlements. However, problems with the so-called 'Swedish derogation' in the UK mean many agency workers lose out on pay, with some earning up to £135 a week less than directly employed staff doing the exact same job. In 2009, the UK government estimated that the costs of complying with the Temporary Agency Worker Directive, including with a 12-week qualifying period would amount to an average annual cost of £1,775 - £1,935 million. Had the UK adopted a day one right to equal pay the average annual cost was estimated to be £4,154 - £4,594m<sup>13</sup>. The CBI own estimates estimated in 2011 that the UK Agency Worker Regulations would cost UK business £1.8 billion to comply with<sup>14</sup>. However, the actual costs in the UK are likely to be far lower due to the wide spread use of the Swedish derogation.

Protections for outsourced workers: EU TUPE rights introduced important protections for workers affected by contracting out, company buy-outs and even the privatisation of public services. Without TUPE rights employees could be dismissed, have their pay and conditions cut, or be placed on zero-hours contracts in place of their permanent secure jobs. It is estimated that nearly 1 million (910,000) people benefit from TUPE rights every year.

Rights to be consulted on collective redundancies, and for unions to present an alternative to employers, thereby saving jobs. According to Workplace Employment Relations Survey 2011, in 40 per cent of workplaces that engaged in redundancy consultations, managers' original proposals were altered, leading to fewer redundancies, and extra help and pay for individuals facing redundancy. Weakening these rights post-Brexit could mean that it is cheaper and easier to lay off UK workers. This would also put UK workers at further risk of losing out when decisions are made by transnational companies about where to locate plants and jobs.

Protections for migrant and posted workers: migrant workers are guaranteed equal treatment whilst posted workers who work temporarily in another country are guaranteed core workplace rights.

Transparency over terms and conditions of employment: This right existed since 1963 but was improved in 1993 following the adoption of the EU Written Statement Directive. For the first time, employers were required to provide details of relevant collective agreements.

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<sup>12</sup> <http://webarchive.nationalarchives.gov.uk/20060215130612/http://www.dti.gov.uk/er/fixed/riashort.htm>

<sup>13</sup> <http://webarchive.nationalarchives.gov.uk/20121205233947/http://www.bis.gov.uk/assets/biscore/employment-matters/docs/awd-consultation.pdf>

<sup>14</sup> <http://www.telegraph.co.uk/finance/jobs/8888801/CBI-Government-must-overhaul-damaging-agency-workers-rules.html>

They were also required to issue the statement within two months as opposed to the previous 13 weeks and to provide detailed information about pay and conditions, making it easier for employees to enforce their rights. Requirements on employers to notify staff of changes to terms and conditions were also significantly tightened.

Remedies and sanctions: EU membership has also substantially strengthened the remedies for employment law breaches. Under UK law, employees are generally only entitled to be compensated for any losses they have incurred. UK legislation also often limits the compensation which can be awarded to an individual. For example, in 2013, the UK government reduced the new cap for compensation in unfair dismissal cases based on annual earnings, which penalised low paid, part-time workers.

In contrast, EU law generally provides that any sanctions must be 'effective, proportionate and dissuasive' and should have a 'real and deterrent effect on employers'. This resulted in the previous UK cap on compensation for discrimination claims being removed. EU law also requires that remedies for claims involving EU rights should be equivalent to those in similar domestic actions. This led to the limits on back pay compensation in the Equal Pay Act being increased from two to six years.