

Brexit: Levelling the playing field

Hello my name is Vincent Power and I'm from A&L Goodbody and I hope that you and yours are safe and well at this time. What I'm going to do in this Brexit soundbite is I'm going to chat through the whole concept of the level playing field, a concept that we often hear about but nobody defines with great precision. And it's become a very important topic in the whole Brexit trade negotiations. So I just thought from a business perspective what does the level playing field really mean?

Everyone loves a level playing field. Almost every sector of the economy has called for one and there is no harm. It makes you look good, you seem fair and you seem reasonable. But having a level playing field doesn't guarantee a fair outcome.

There was a level playing field in the Colosseum in ancient Rome but that didn't guarantee a fair outcome or a fair fight if you were up against the lions. But without a level playing field the chances of a fair fight are slimmer.

Not surprisingly the level playing field has made yet another appearance this time in the Brexit trade talks. At one level the two sides are not evenly matched. Yes the UK's economy is one of the biggest in the world but if you compare the size of the UK's GDP at the GDP of the remaining 27 member states of the European Union then in relative terms and comparing the dollar equivalence you're comparing a table tennis ball with a basketball, a ping-pong ball with a basketball. They're the dimensions.

And yet in this area size doesn't matter, at times size isn't everything. If you think about it, the simple little bullet can actually floor an elephant. But you do need fairness.

And therefore, not surprisingly, the Treaty of Rome, which founded what is now the European Union, involved a set of rules which are designed to create or maintain that level playing field. First, you've got a set of rules which say that businesses could not form cartels or anti-competitive arrangements, a rule that contemporary competition lawyers call Article 101 of the Treaty and the Function of the European Union. So businesses may not gang up on customers or consumers.

And it sounds good. Sounds fair. Sounds like a level playing field. And both the UK and the EU would agree on it. Both of them actually have this in their own rules. So anti-competitive arrangements among businesses, that sounds fine.

The second rule in the EU treaties on a level playing field are that a business with market power, somebody who is dominant for example, an 800 pound gorilla in the business jungle, they should not throw their weight around unfairly, unreasonably or improperly.

Yes they may exist, dominance is not a problem but it's the abuse of the dominance. It's what contemporary competition or as we call Article 102 of the TFEU and that's again fair and both the UK and the EU have that in their own role so that's fine.

But the EU treaties go a step further. The treaties stop member states or member state governments acting unfairly. And first, the EU treaties stop member states giving unfair or improper state aid and that's hugely important.

A member state may or could distort competition by forgoing revenue which you could otherwise have received in tax or giving away property at less than market value or buying assets at an overvalue. And even the smallest economy in the EU could still be many times the size of many multinationals. So its ability to distort competition is very great and therefore articles 107 to 109 of the TFEU seek to control state aid. The articles don't outlaw state aid, we need to permit some forms of state aid such as the aid to meet the pandemic for example at the moment.

And secondly the EU treaties stop member states giving preference or adopting special rules favouring some competitors and they do that in Article 106 of the TFEU. So that's very straightforward then you might say the EU has various rules controlling businesses and those rules control EU member states from acting unfairly. or disturbing the level playing field.

And that's held the peace for the last 50 years. And the UK has been very keen for example on the EU state aid rules to prevent the likes of France and Germany or Italy, or the Belgium, Ireland, Greece, or indeed any member state acting unfairly.

Margaret Thatcher and she had been Prime Minister of the United Kingdom for eleven and a half years. If you think about it over the last eleven and a half years the UK has had four Prime Ministers. So she was Prime Minister for a long time and during that time she said that no government in Europe had fought more resolutely against state aid, subsidies and protectionism than the UK government and she was right.

Our Conservative governments were opposed implacably to giving unnecessary or undesirable state aid and whatever you think about. Whether it's right or wrong state aid, she was right, no government had fought as strongly.

She wanted a level playing field. And therefore it's ironic that the current Conservative government in the UK wants to reject the state aid rules that their political North Star, Margaret Thatcher, fought so hard to uphold.

Now the current UK government does not want to have state aid rules from the EU because it doesn't want to limit the ability of the UK to subsidize businesses which the UK government might want to support at some stage in the future.

Now conversely, the EU wants more than just the rules on state aid and preferences. It wants those two rules, but also wants to ensure that the UK does not have tariff-free access to the EU, but be subject to less stringent rules on consumer safety, product liability, technical standards and so on.

And you can see the EU's point. It doesn't want a cat flap of an arrangement whereby the UK can invite in businesses from around the world to manufacture or operate from the UK, receive great grants, protections from the UK government or the devolved government and then get preferential access to the EU.

However, you can also see the UK's point. It says, look, it has left the EU. It doesn't want to have to live by the EU rules. It doesn't want to have its issues decided by the European Commission or the Court of Justice and it should be free to set its own rules.

What could happen in the negotiations is somewhat of a temporary solution. It may well be that the phraseology of level playing field may get changed so as to save the UK's blushes because there will probably be a level playing field mechanism in the agreement despite the UK's protestations.

But the EU may not get everything that it's hoping for either. So there could be somewhat of a compromise with more rules to be adopted over time. So whatever level playing field might emerge could well be a level playing field with a sign saying 'under construction' and/or 'work in progress.'

We will make progress towards a level playing field but probably just not yet.