POLITEIA

The Lawyers Advise

UK-EU Trade and Cooperation Agreement

Unfinished Business?

Martin Howe QC
Barnabas Reynolds
David Collins
James Webber
Sheila Lawlor

A FORUM FOR SOCIAL, ECONOMIC AND CONSTITUTIONAL THINKING

POLITEIA

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The Trade and Cooperation Agreement

Why Consult 'The Star Chamber'?

When Boris Johnson signed last December's EU-UK trade deal, he, like many in the country, waited for the verdict of the 'Star Chamber', a group of lawyers convened by the European Research Group (ERG) of MPs and chaired by Sir Bill Cash MP. The Star Chamber would review the trade deal, line by line, to advise on whether it was consistent with UK sovereignty. Johnson, reported as saying 'I know the devil is in the detail', was confident the deal would survive 'ruthless' scrutiny from the 'Star Chamber legal eagles'.

The following chapters present a full version of the Star Chamber's legal opinion on Johnson's EU–UK Trade and Cooperation Agreement (TCA), signed on 24 December 2020, specially prepared for publication by a team including two of the Star Chamber lawyers and two other lawyers. The trade deal was the next act in the protracted drama played out after the 2016 EU referendum between the EU and the UK.[1] Throughout the battles in parliament, the government and the courts, the ERG group of MPs, who worked towards a sovereign Brexit, had played an important role. A minority on the parliamentary benches in the May era, these MPs had been influential in seeking to hold the government to account, analysing the more complex legal and constitutional implications of different options, often consulting specialist legal advice, including from some of the lawyers who later judged the TCA. Throughout the process since 2016, their focus had been on what constitutional and trade arrangements would be consistent with the goal of restoring UK sovereignty, and on where Theresa May's deal had failed. The legal opinion on which they would judge the TCA is therefore of particular interest, an historical document on the basis of which the most exacting

[1] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community [Euratom] and the United Kingdom of Great Britain and Northern and Northern Ireland,
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf.

Eurosceptic MPs approved the new Prime Minister's deal and so allowed for its smooth adoption by parliament.

The authors of the following chapters include Martin Howe QC, Barnabas Reynolds, James Webber, practising lawyers specialising in areas of EU law and its regulatory framework affecting economic activity, and David Collins, Professor of International Economic Law at City University. Howe's work for Politeia and as Chairman of Lawyers for Britain had set the constitutional and trade framework against which the different official proposals emerging throughout would be judged – from the transition plans that would leave the UK a 'vassal state' to the May Withdrawal Agreement and the Northern Ireland Protocol in November 2018 showing how political rhetoric failed to reflect the legal reality.[2]

Other work by these lawyers since 2016 had prepared the way for a trade deal to be reached in a comparatively short time, between March and December 2020. Reynolds, in a series of Politeia publications, showed how financial services trade could be on the basis of mutual recognition with single market 'passport' regulations replaced in the UK by UK laws – helping to shape the UK's proposal in 2018 for a Free Trade Agreement (FTA) based on mutual recognition that each party's laws guaranteed equivalent standards ('enhanced equivalence'). That proposal is still on the table, with all to play for.[3] James Webber's proposals explained how state aid rules could be organised in line with international practice.[4] David Collins proposed agreeing a minimalist, tariff free, quota free, goods trade deal which could be expanded over time, rather than seeking to achieve everything at once, an approach reflected in reaching the TCA mutual

[2] Martin Howe's Politeia publications include: *Avoiding the Trap – How to Move on from the Withdrawal Agreement*, 2019; co-authored with Richard Aikens and Thomas Grant. Thomas Grant's Politeia publications include: *Leave as You Entered: Brexit in International Law*. For his analyses for Lawyers for Britain, see: https://lawyersforbritain.org/time-to-replace-the-deeply-flawed-northern-ireland-protocol, https://lawyersforbritain.org/this-flawed-deal-is-a-tolerable-price-to-pay-for-our-freedom.

[3] Barnabas Reynolds, *A Blueprint for Brexit: The Future of Global Financial Services and Markets in the UK* (2016) and subsequent publications 2017-20, https://www.politeia.co.uk/wp-content/Politeia%20Documents/2021/FEB%20-%20Barney%20Reynolds/Publications%20-%20Barnabas%20Reynolds.pdf?_t=1612434078.

[4] James Webber, *All Change? UK State Aid after Brexit: What Law? What Courts?* (2020), *The Withdrawal Agreement, State Aid and UK Industry: How to Protect UK Competitiveness* (2019) co-authored with Barnabas Reynolds.

recognition of professional services qualifications, on which limited progress was made; and recommendations for a mechanism to resolve the 'level playing field laws' disputes through WTO anti-dumping and anti-subsidy measures, reflected in the TCA 'rebalancing arrangements' for tackling potential breaches.[5] They were assisted by Christopher Howarth and Emily Law. Each judged the TCA and its detailed trade framework on whether it was consistent with UK sovereignty.

This goal, sovereignty, had become a matter of bitter political division amongst those in power between 2016-19, as this chapter will now discuss.

A Question of Sovereignty[6]

The decision taken by the electorate at the 2016 referendum to leave the EU was followed by a protracted struggle involving different parties – the EU, the UK Government and Parliament and other groups and individuals, some of whom successfully involved the courts. For the majority of voters who backed 'leave', however, the matter remained straightforward. In casting their vote, as a number of these interviewed after the referendum told the BBC, they had 'voted for sovereignty'.

Nevertheless, for many charged with executing the decision, sovereignty was seen as a problem to be overcome. In parliament, where the majority had favoured remaining in the EU, many now wanted the UK to be closely linked to the EU and within its legal orbit, perhaps in a quasi customs union, perhaps within a single market arrangement. Although such a course would entail the application of the EU rulebook and its supervision by the European Court of Justice (ECJ), in their view Brexit would best be organised through a degree of continuity rather than constitutional change. The alternatives, of being outside the EU orbit, or the UK leaving without a deal as it was entitled to do under Article 50 of The Treaty on European Union (The Maastricht Treaty), were anathema. Yet a no deal exit was to become the default under the EU Withdrawal Act (June 2018), which repealed the European Communities Act of 1972 and set out the arrangements for withdrawal, including what would happen if no deal were reached. Many in parliament

[5] David Collins, *How to Play the EU's Playing Field – trade Remedies for a Trade Deal* (2020), *The EU, the UK and Global Trade - A New Roadmap* (2019), *Negotiating Brexit: The Legal Basis for EU & Global Trade* (2018).

[6] This section draws on my *Deal, No Deal? The Battle for Britain's Democracy* (2019).

became even more determined to prevent a no deal exit over the following eighteen months. They even attempted to seize executive powers and bind the government to their will. That set the stage for conflict and turmoil in parliament until December 2019.

For the government, initially publicly committed to leaving the EU, the EU's single market and its customs union, the task was twofold. The prime minister, presiding over a minority government after the 2017 election, sought to juggle the numbers in an increasingly fractious parliament, keeping different options alive. At the same time she sought to negotiate with the demands of the EU as it imposed its own one track negotiating strategy, and remained intent on a large measure of legal and economic control. In parliament, many MPs disagreed with the leave vote but also disagreed amongst themselves about the extent and pace of Brexit.

With the EU as well as on the parliamentary front, the battle for over three years was about how closely the UK should remain within the EU orbit, about 'how much' Brexit and how much sovereignty there should be. Brussels set the timetable, obliging the UK to meet the EU's withdrawal ('divorce') terms for a settlement, before it would even begin to discuss a trade deal - a strategy that would see the prime minister gradually out-manoeuvred and isolated.

First came the EU's 2017 plan to keep Northern Ireland within the EU's customs and regulatory area. Its aim, so the EU claimed, was to avoid a hard border on the island of Ireland: the ploy, though serving the purposes of EU realpolitik in giving Brussels a lever over the UK's economic arrangements, was more likely to exacerbate unionist and nationalist divisions than preserve the spirit of harmony presumed to flow from the 1998 Good Friday (or Belfast) Agreement. Despite the UK rejecting the plan in December 2017, the EU included it in the draft withdrawal agreement which the EU published on 28 February 2018, with a Northern Ireland Protocol. Under this, Northern Ireland would remain in an EU customs union and be in a common regulatory area with the EU, with EU rules for goods and agri-goods, and state aid.[7] The

[7] Draft Withdrawal Agreement, 28 Feb 2018 TF50 (2018) 33 - Commission to EU 27, 118 pages, Protocol on Ireland/Northern Ireland. pp 98-105, III, 3-9, 'Common regulatory area'; V, 15, 'Subsequent agreement'.
https://ec.europa.eu/info/sites/info/files/draft_withdrawal_agreement.pdf.

Protocol would only cease if satisfactory alternative arrangements to avoid a hard border were agreed.

The EU made no mystery about the future basis it intended for UK-EU relations, and followed up with draft 'guidelines' for that relationship. For a free trade agreement for goods, there must be reciprocal access to fishing waters, and for services the aim would be to allow market access to provide services under host state rules. To prevent the UK having 'unfair competitive advantage', there must be 'robust guarantees' to ensure a level playing field for 'substantive' rule alignment with EU and international standards, mechanisms for effective implementation, enforcement and dispute settlement 'as well as Union autonomous remedies …'. Future governance would take into account the need to ensure 'effectiveness and legal certainty' and the autonomy of the EU legal order, including the role of the ECJ as developed in the jurisprudence.[8]

Restoring UK Control?

Initially May held out, refusing to accept that Northern Ireland would be within the EU's customs and regulatory area, since this implied a breach of the UK's constitutional integrity and a border down the Irish Sea to which no UK prime minister 'could ever agree', and highlighting this, and other matters on which the parties did not agree, in the UK's version of the draft withdrawal agreement on 19 March.[9] For the future, she proposed two options for customs management outside the EU customs union and an FTA on the basis of *'*a comprehensive system of mutual recognition' in which the

[8] 7 March 2018, European Council (Art.50) (23 March 2018)-Draft guidelines, https://www.euractiv.com/wp-content/uploads/sites/2/2018/03/European-council-Art.50-23-March-2018-Draft-Guidelines.pdf. paras 9, 12 (Tusk Guidelines, 7 March 2018).

[9] May told the Commons on 28 Feb that no UK prime minister 'could ever agree' to the EU proposal that Northern Ireland be under separate single market arrangements, threatening the constitutional integrity of the United Kingdom; she expected changes in the 'common regulatory area' after Brexit on the island of Ireland. https://www.bbc.co.uk/news/uk-politics-43224785.

The UK published a highlighted version of the Draft Withdrawal Agreement on 19 March 2018, with 129 pages of text that indicated those EU proposals on which there was disagreement (white), others which were yet to be settled (yellow) and those matters which were agreed (green): *The Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf.

default was that UK law 'may not necessarily be identical to EU law but … should achieve the same outcomes …'. For services, the goal was mutual access on the principle of mutual recognition; for financial services the aim was enhanced equivalence, building on an EU law concept for mutual recognition, while providing for greater certainty for businesses against a potential or sudden unilateral decision by making enhancements.[10]

But, increasingly embattled and most likely unequal to the machinations of the EU's negotiators or to those of some UK officials for whom manifesto pledges are there to be circumvented, May's resistance to the EU's draft agreement was whittled down over the next months. EU demands overcame UK preferences, the UK moving to a different plan to keep the whole of the UK within the EU's legal orbit for goods trade, and Northern Ireland within the EU's economic and regulatory area. The new scheme appears to have been signed off at a private meeting with Angela Merkel in Berlin before being presented to and imposed on the cabinet at Chequers on July 6th. Under it, the UK and EU would be bound by a common rulebook for state aid, goods and agri-products and the UK would commit to harmonisation with EU rules, though there would be parliamentary oversight on whether to include individual rules within the UK's legal order. A White Paper followed a week later. [11]

The Chequers plan, which would put parts of the UK economy under EU economic law, marked the UK government's official change of course to limit Brexit to the parameters set by the EU, while attempting to pretend otherwise. It prompted the resignation of two cabinet ministers, Boris Johnson and David Davies, with a number of junior ministers following suit. Other senior cabinet ministers may have been reconciled to, if not eager about, the prospect of keeping the UK goods economy bound into the EU's economic rulebook, partly to prevent potential disruption to industrial

[10] For the UK's future position, see Theresa May's speeches, 2 March 2018, https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union and 5 March 2018, https://www.theyworkforyou.com/debates/?id=2018-03-05b.25.0 The customs options were either for a partnership that mirrored (for the UK) EU rules for exports of EU bound goods, or an arrangement jointly to implement measures, with specific provisions for Northern Ireland. For financial services, see Philip Hammond, 7 March, https://www.gov.uk/government/speeches/chancellors-hsbc-speech-financial-services.

[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF.

sectors, particularly those with EU supply chains. They may also have been influenced by the lobbying of powerful EU international corporations, such as BMW-owned Rolls Royce and the multinational Franco-German dominated Airbus, threatening job losses and retrenchment. Besides, the UK's March proposals had also been aimed at services on the basis of mutual recognition of each party's laws.[12] Given that the goods economy represented less than 20 per cent of the UK economy, with services accounting for around 80 per cent, [13] ministers may have believed a quid pro quo might be agreed on that basis. In any case, after Chequers, further concessions to the EU followed before the final position was revealed in November's Withdrawal Agreement (the 'May Deal').

Under the May Deal and its Northern Ireland Protocol (increasingly referred to as the 'Backstop'), the UK would be in a single customs area with the EU under many of the same economic rules, including those for ensuring a level playing field. Northern Ireland would fall within both the customs union and much EU law, e.g. for agri-goods, state aid, VAT. The formal expectation was that the Protocol was to be temporary, both sides to use 'best endeavours to conclude, by 31 December 2020, an agreement which supersedes [the] Protocol in whole or in part' (Arts. 1, 2). Furthermore, matters of EU law in the agreement would be subject to ECJ jurisdiction.[14] After a five hour discussion May drove the treaty, a 599 page document, through the cabinet at a meeting where no vote was taken. This prompted fresh resignations. Ministers had not been given the chance to consult or consider the document collectively in advance, though some had been permitted to glance through it at the eleventh hour in Downing Street, the night before.

Though, under the May deal, the UK would not achieve the sovereignty for which people had voted, nor would full law-making powers be restored to this country, the government seemed to make matters worse. The Prime Minister's summary for MPs that it 'takes back control of our borders, laws

[12] See note 10 above, May speeches, 2, 5 March 2018, Hammond speech 7 March 2018.

[13] House of Commons Library figures (March 2021) suggest that in 2019, the service industries accounted for 80% of total UK economic output (Gross Value Added). https://commonslibrary.parliament.uk/research-briefings/sn02786/.

[14] Withdrawal Agreement, endorsed by EU Council 25 Nov 2018 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

and money … [and] it protects … the integrity of the United Kingdom ...', or that the Northern Ireland 'backstop' arrangements were temporary, did not hold up in parliament or with a politically savvy and acute public, marking the beginning of the end for the May regime in the final battles in parliament and with the people.[15]

In the Commons, Jeremy Corbyn, the Opposition leader, explained that the Withdrawal Agreement would mean that the UK entered into an international treaty it could never leave. 'The backstop locks Britain into a deal from which it cannot leave without the agreement of the EU'; it applied 'separate regulatory rules to Northern Ireland, creating a de facto border down the Irish Sea' with Northern Ireland under the Customs Union 'but not the rest of the UK'. He reminded the prime minister of her words that such a scenario was something which 'no prime minister of the United Kingdom could ever agree to'.[16] The prime minister 'pulled' the first vote scheduled for 10 December, probably because it would not pass. Many MPs who had started out by questioning what, precisely, 'leave' meant, and then opposing the 2018 European Withdrawal Bill, now focussed on opposing the May Deal, while some who continued to oppose a 'no deal' exit sought to seize executive power to prevent such an exit and fashion a more congenial finale. Throughout early 2019 the prime minister attempted three times to secure the backing of parliament. May's deal, as it became commonly called, was rejected three times by the Commons, on 15 January 2019, on 12 March and on 29 March, after which the electorate returned to pass judgment.

At a Welsh by-election in March, the UK-wide local council elections in May, and the EU parliamentary poll in June, when the new Brexit Party swept the polls, the voters dramatically cut the vote share of both main parties, and Mrs May announced her resignation, to take effect from July.

Changing Course

Bequeathed to the new prime minister, Boris Johnson, was a difficult legacy: a minority government, unprecedented turmoil in the Commons, a Withdrawal Agreement he had denounced, a 31 October exit date (delayed

[15] https://www.gov.uk/government/speeches/pm-statement-on-brexit-negotiations-15-november-2018. The PM, updating MPs in the House of Commons, had suggested that it was unlikely the backstop, 'an insurance policy' would be used', that it was 'temporary', and that there was 'a mechanism by which the backstop can be terminated.

[16] https://www.youtube.com/watch?v=LjQwkKvdMYc, 15 Nov 2018.

first from 29 March and then 12 April) and a deadlocked parliament in which MPs sought to seize executive control to prevent a no deal exit, emboldened by the five year fixed-term parliament act and encouraged by a partisan speaker. Choosing the territory on which he proposed to fight, he renegotiated the Withdrawal Agreement with the EU in October, removing the obligation for Great Britain to remain in the EU customs union and under related EU economic law. Northern Ireland, though to be in the UK's internal market and customs territory would remain under EU regulations for some matters including goods, agri-products and state aid. Other inherited problems remained, e.g. the ECJ's role in determining EU citizens' rights, and the financial payments to the EU thought to exceed legal obligations. Still, each side committed to using 'best endeavours, in good faith' to negotiate agreements for their future relationship as outlined in the new 'Political Declaration'. In that document both the UK and EU agreed 'to develop an ambitious… economic partnership…encompassing a Free Trade Agreement…'.[17]

The focus returned to Westminster, where, in the end, Opposition MPs broke ranks sufficiently to support dissolution, and a general election, fought on 11 December, returned Johnson on a manifesto pledge of leaving the EU, its Single Market and the Customs Union, winning an 80 seat majority, gaining 48 seats and the highest percentage of the popular vote since 1979. Exit, on 31 January 2020, would be followed by a transition period of 11 months to end on 31 December, deal or no deal.

Trade on Whose Terms?

> *.. the envisaged agreement should uphold common high standards, and … over time with Union standards as a reference point, in the areas of State aid, competition, state-owned enterprises, social and Employment standards, environmental standards, climate change, relevant tax matters*

[17] Agreement on the withdrawal of the UK from the EU and European Atomic Energy Community, 19 Oct 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf; Political Declaration, 19 Oct 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840656/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf.

> *and other regulatory measures and practices in these areas … [it] should rely on appropriate and relevant Union and international standards …[and] include … adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement, including appropriate remedies. The Union should also have the possibility 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* … (European Council negotiating aims, 25 Feb 2020)[18]

> *… [The] future relationship will only deliver … if it includes robust guarantees which ensure a level playing field … 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 … 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 …* (Donald Tusk, Art.50, Guidelines, 7 March 2018)[19]

As these two extracts show, the EU's proposed trade aims, announced in February 2020, envisaged a trade and economic partnership little changed in aims from that of 2018, a position underlined by the caveat that the 2018 guidelines were to define the 2020 EU approach. For a zero tariffs, zero quota free trade agreement (FTA), the UK must ' ... uphold common high standards', with EU standards as the reference point, on level playing field laws such as environmental and labour market standards, state aid and subsidies. There appeared also to be the expectation that the UK would commit to align its laws with those of the EU in years to come. The EU would be the arbiter of whether or not the UK's arrangements passed muster, the EU's own system used as the measure. Moreover, Donald Tusk's March 2018 guidelines for the European Council would define the EU's approach.

[18] Section 15, Level Playing Field and Sustainability, https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf.

[19] European Council 23 March 2018 7 March 2018, https://www.euractiv.com/wp-content/uploads/sites/2/2018/03/European-council-Art.50-23-March-2018-Draft-Guidelines.pdf.

The list of chosen targets covered many parts of UK policy and its productive economy, specifically referring (amongst others) to: 'State aid, competition … social and employment [and] … environmental standards, climate change, relevant tax matters and other regulatory measures and practices in these areas' opening the way for more extensive EU interventions on the conduct of the UK economy, for example on energy pricing and competiteness in energy supply.The EU stipulated that the agreement should rely on relevant EU and international standards; that there should be 'mechanisms …[for] effective implementation … enforcement and dispute settlement' domestically; and that these should include 'remedies … to apply autonomous … measures … quickly' if equal competition conditions were breached, with EU standards serving as a 'reference point'.[20] The likelihood was that the EU would seek to extend its remit to related areas, potentially intruding into other nooks and crannies of UK policy and economic life, with the ECJ adjudicating matters of EU law.

Anyone who had followed the process since 2016 could see that, if the EU again carried the day in the 2020 trade talks, UK trade and the economy would be stymied by the EU's restrictions. Instead of the normal arrangements for international trade under which a country trades under its own laws, selling to the other party under the latter's standards but striking a free trade deal on the basis of mutual recognition of the other party's rules, with disputes adjudicated by independent arbitration, the EU appeared to insist on setting its own arrangements as the yardstick by which the UK would be judged, and to imply that it and the ECJ would be judge and jury for every alleged breach under its own system.

The UK committed to upholding common standards. But it would not agree to be bound by EU-made rules or the jurisdiction of the ECJ on these or for dispute resolution. As early as August 2019, Boris Johnson had explained:

> *' … When the UK leaves the EU and after any transition period, we will leave the single market and the customs union. Although we will remain*

[20] (5870/20ADD 1 REV 3; Annex; Council decision authorising the opening of negotiations with the UK for a new partnership agreement, Addendum (negotiating directives), 25 February 2021.The document (II,6) maintained that the EU's approach would 'continue to be defined by the… positions and principles set out in the 23 March 2018 and 25 Nov 2018 documents.'
https://www.consilium.europa.eu/media/42736/st05870-ad01re03-en20.pdf.

> *committed to world-class environment, product and labour standards, the laws and regulations to deliver them will potentially diverge from those of the EU. That is the point of our exit and our ability to enable this is central to our future democracy.' (Boris Johnson to Donald Tusk, 19 August 2019)*

Johnson had from the outset contended that UK laws could 'potentially' diverge from those of the EU without undermining the UK's high environmental, product and labour market standards. He had rejected the Chequers plan and the May Deal, which compromised the UK's freedom to diverge; had revised the parameters of Theresa May's deal to extricate swathes of the UK economy from the EU legal orbit and a previous commitment to align UK with EU laws, albeit at the cost of leaving Northern Ireland in the EU's regulatory area; and had fought and been returned in a general election on the pledge that he would leave the EU, its single market and its customs union.

The stage was set for a year of difficult trade talks. Throughout 2020, EU insistence on the level playing field laws rules, on state aid and subsidies as well as on other matters, made reaching a quick trade deal seem unlikely. Johnson staked out the UK's ground and stuck to it; his chief negotiator, David Frost, appeared to remain impervious to and unpliable in the face of EU demands, with each party holding out. By the autumn a trade deal seemed ever more unachievable. The prime minister resurrected the option of an 'Australian' type deal, similar to the off-the-shelf standard World Trade Organisation (WTO) trade arrangement and the term now used for a no deal exit, rather than the Canada, tariff free, quotas free model sought. The UK prepared for a 'no deal' exit, with Michael Gove, the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, taking charge.

By the end of the year, though, a formula was found under which a legal mechanism could be used to test and judge unfair distortions. But the question remained whether for other contested areas, such as fisheries, state aid and subsidies, the UK would be sovereign, with the country and its businesses free trade under its own laws? Did the TCA terms to prevent distortion and ensure fair competition on environmental, labour market and product standards, with their elaborate arrangement under which allegations of distortion would be subject to high thresholds of proof and adjudicated by independent arbitration, meet UK aims?

Unfinished Business

Although this introduction has focussed on the question of trade in goods and agri-products, and the level playing field laws, there remain other areas of unfinished business where the TCA falls short of expectations. Most notably, services trade is not covered. Yet, the minimalist agreement opens opportunities to be seized and developed. For services, the UK still aims for trade on the basis of mutual recognition. For financial services the UK has already gained a considerable advantage, because the TCA leaves it unfettered. The UK is therefore now free to restore its law for the sector and remove the unnecessary layers of inherited and stifling, anti-competitive, EU law – to the benefit of its wider trade, globally and in the EU, while pursing the aim of an enhanced equivalence trade deal.[21]

Another matter of unfinished business, potentially more serious, remains Northern Ireland's status. Constitutionally a part of the UK, under the Withdrawal Agreement and its Protocol, Northern Ireland is also in the EU's economic regulatory area. A border placed in the Irish Sea, ostensibly for checks on goods and agri-products entering and leaving the EU single market and customs union, has hindered the free exchange of goods between one part of the UK and another, and runs contrary to the spirit of the Good Friday Agreement. It has also undermined the stability of the status quo ante at all levels.

In these areas, there is much at stake. Not only are there the technical aspects of framing trade treaties in international law. But there is the constitutional and political reality of UK sovereignty, which has proved so difficult for the EU to accept.

The UK is an independent state, having democratically voted to restore sovereignty, not once, but three times since 2016, robustly, plainly and determinedly so in 2019. It has left the EU under the arrangements set out in Article 50. The EU has therefore lost control of UK law-making. It should now accept that fact, extend trade on the basis of enhanced international arrangements. It should also agree on workable arrangements to replace the Northern Ireland Protocol that respect both the constitutional status of Northern Ireland and the Good Friday Agreement.

[21] The subject is developed in *Restoring UK Law: Freeing the UK's Global Financial Market*, Barnabas Reynolds, Politeia, 2021.

I

Unfinished Business 2020

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On 29 December 2020 the European Research Group's Legal Advisory Committee delivered its opinion to MPs on whether the UK-EU Trade and Cooperation Agreement 2020 (the TCA) was consistent with the preservation of UK sovereignty. The restoration of sovereignty, the overarching aim of the electorate's decision in 2016, had been central to the matter put to a vote in the Referendum. This question is intrinsic to the UK's successful departure from the EU and its withdrawal from the EU's 'pooled' sovereignty arrangements, which involved joint decision-making (through qualified majority voting across many areas) and common legislative measures. The Committee was asked to address the threshold question of whether the TCA recognised the effectiveness of the UK's departure from the EU's Treaty-based arrangements and the renewal of its powers to operate the international law plane as an independent nation state. The conclusion reached was that it was did so. This paper, prepared by members of the Committee and two further experts who assisted the Committee,[22] sets out the full version of that advice. It opens with the unfinished business – i.e. the matters of UK sovereignty remaining to be resolved, arising from the Withdrawal Agreement and its Northern Ireland Protocol – and then covers areas where temporary clogs arise for UK sovereignty, such as for fisheries. There is also further discussion as well as legal observations on how the agreement is constructed and may work in practice.

Importantly, however, the first matter to be considered is the vital concessions on sovereignty made by the Withdrawal Agreement 2020 and its Northern Ireland Protocol. These contained terms which were, in essence, an EU prerequisite for the EU's negotiation of the TCA during the course of the eleven months from February 2020 to the end of the year. The question is whether they were worsened by the TCA or left outstanding. In summary, the TCA leaves intact those various temporary encroachments on UK sovereignty, including the application of EU law to Northern Ireland (and over various other matters such as State aid), the ongoing role of the European

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Court of Justice (CJEU) in those areas and a residual executive role for the European Commission. It had been envisaged in the Withdrawal Agreement itself that the end destination would recognise UK sovereignty,[23] but in the time available this was not yet achieved. For reasons which have become clear, the outstanding matters will best be resolved with a similar approach to that used for the TCA.

- *The Withdrawal Agreement and Northern Ireland Protocol.* There are no provisions in the TCA that are dependant on the 2019 Withdrawal Agreement, concluded under Article 50 of the Treaty on European Union. There is one provision – Inst.24 (4)[24] – which allows for cross retaliation if the EU or ECJ find the UK in breach of the Withdrawal Agreement or the Northern Ireland Protocol.[25] However, in practice this Article does not add materially to the remedies already available to the EU were the UK to resile from one of the terms of the 2019 Withdrawal Agreement. Art.INST.24(4) permits a party to suspend obligations under the TCA against the other party if it 'persists in not complying with a ruling of an arbitration panel established under *an earlier agreement* concluded between the Parties' [emphasis added]. This appears to cover non-compliance with an arbitration ruling under the Withdrawal Agreement and entitle the EU (if it were complaining party) to suspend treaty rights under the TCA. However, that would of course assume that the Withdrawal Agreement continued to survive. Moreover, given the separate right of both sides to leave the TCA on notice, this article does not add significantly to the legal remedies already inherent in the Withdrawal Agreement.

  Meanwhile, the 2019 Withdrawal Agreement and Northern Ireland Protocol maintain the long-term jurisdiction of the ECJ in a number of areas.[26] Although the TCA does not improve the legal position of

[23] See the commitment of the parties, in Article 184 of the Withdrawal Agreement, to use "best endeavours" to achieve agreements for a future relationship by the end of 2020 on the terms of the Political Declaration which was entered into at the same time as the Withdrawal Agreement, "with a view to ensuring that those agreements apply, to the extent possible, as from the end of [2020]". See also the reference to the agreements finally entered into needing to ensure UK sovereignty and the protection of the UK's internal market in Article 4 of that Declaration.

[24] Inst.24. (4) on P. 391 of the TAC.

[25] Including no references to expanding the remit of Article 178 of the WA 'Temporary remedies in case of non-compliance' to include retaliation in the trade agreement.

[26] Under the Withdrawal Agreement and Northern Ireland Protocol, the ECJ has: jurisdiction to "interpret" (i.e. potentially alter) the rights of EU nationals in the UK, via preliminary

Northern Ireland vis à vis the Protocol, nor does it worsen it. It remains open to HMG to address concerns about Northern Ireland's place in the Union by seeking to withdraw from or supersede the Protocol. In this regard the UK has a *prima facie* case to preserve its (entire) sovereignty based on a range of international law remedies, including potentially for breaches by the EU of the Withdrawal Agreement, under the Vienna Convention and domestic legal remedies based on new UK legislation clarifying Northern Ireland's position within the United Kingdom.[27]

We should also acknowledge the limited progress made in ameliorating some of the worst problems of the Protocol in the Joint Committee agreements on State aid 'reach back' into Great Britain and on the 'goods at risk' rules. However, the United Kingdom will not have fully regained its sovereignty until these aspects of the Withdrawal Agreement and of the Northern Ireland Protocol are fully dealt with and sovereignty-compliant solutions are implemented for Northern Ireland. We regard this as an area of unfinished business.

- *Fishing after mid-2026.* The Agreement states that *'An adjustment period is hereby established. The adjustment period shall last from 1 January 2021 until 30 June 2026.'*[28] The agreement does not in fact give up sovereignty over UK fish as a legal matter. The question is one of practical sovereignty. The question arises as to what happens in June 2026.
    - Annexes to the agreement include EU allocations of fish for years after the end of the Agreement.[29]

references from UK courts in actions begun before 2029, and thereafter via the "Ukraine" clause in the arbitration provisions if the Commission were to pursue an issue; jurisdiction over the post-transition financial obligations of the UK to pay into the EU budget; long tail jurisdiction to adjudicate in relation to facts and matters arising while the UK was a Member State or before the end of the transition, by preliminary references from UK courts or if the Commission initiates a direct action up to four years after the end of the transition; direct jurisdiction under the Northern Ireland Protocol as extensive as if the UK were still a Member State over the Protocol itself and the areas of EU law which the Protocol incorporates: EU single market for goods laws and customs and VAT procedural laws within NI, as well as State aids within NI and elsewhere in the UK if they have an effect on trade under the Protocol.

[27] In this respect the precedent of the notwithstanding clauses in the controversial first draft of the UK Internal Market Bill could be considered afresh.

[28] Article 1 of Annex Fish.4.

[29] Annex Fish.1 and Annex Fish.2.

- However, at the end of the 5.5-year period, the agreement provides a framework for the two parties to negotiate fishing opportunities on an annual basis. These are the sorts of arrangements that are typical between independent coastal states and include, *inter alia*: setting timelines for agreeing Total Allowable Catches; transferring of shares; prohibited stocks; provisions for stock swaps and granting (or denying) access to waters.
- The UK will have the right to deny access to its waters to the EU. This may lead to the EU taking compensatory measures.[30] The compensatory measures are limited to the economic and societal impact of denying access and can only take the form of reciprocal denial of access and tariffs on fisheries products. NB in a 'no deal' scenario, there would have been tariffs on fish, but under the TCA the EU's ability to retaliate against the UK will be strictly limited to the extent to which it is denied access to UK waters. The provisions are reciprocal. There is no additional power to seek damages or compensation from the UK.
- We note that the Energy Chapter also ends in 2026. It may be that the EU intends to link its continuance with further access to UK waters beyond 2026. We note that the Energy Chapter is of limited additional value – the use of existing interconnectors being governed by commercial contracts that are already compliant with EU regulation. Changes to the regulatory treatment to harm UK terms of access to interconnectors is not a credible threat. It would be very difficult legislatively, contrary to the EU's longstanding energy policy and damaging to the EU's wider energy security and green deal goals.

- *Foreign investment and expropriation.* The TCA does not contain a full chapter on foreign investment (there is no guarantee against expropriation without compensation, commitment to Fair and Equitable Treatment and various other standards), nor is there any Investor-State Dispute Settlement, all of which are found in CETA.

[30] Article FISH.9 pp267-268.

II
Basic Principles
Consistent with UK Sovereignty?

Given that the fundamental question to be resolved by the TCA was its recognition of UK sovereignty, it is necessary to verify that the TCA provides for arrangements which are collaborative, but nonetheless consistent with UK autonomy. For this, they must recognise the UK's ability to conduct its trade under international law arrangements arising from the new trade treaty, without being subject to EU laws or control. Various fundamental questions arise for consideration in this context.

EU Member States are not Parties to the Agreement

The TCA does not (unlike most of the EU's other trade agreements) make the Member States parties as well as the EU. The consequence is that, on the EU side, there was no requirement for ratification by each and every Member State.[31] Instead, the EU is the Counterparty to the UK under the agreement, and as such the agreement needed to be ratified by the Council of the European Union and the EU Parliament. The UK ratified the TCA before year ended 2020, but the EU only did so on 30 April 2021, after the EU Parliament approved the agreement on 27 April 2021.

[31] Member state ratifications led for example to the delay in ratification of the Canada-EU deal as a result of objections by the Wallonia regional Parliament in Belgium. National ratification, when it is required, is additional to the consent given by each State individually to ratification by the EU within the Council of Ministers. In its Singapore Treaty advisory Opinion 2/15 of 16 May 2017, the ECJ held that almost all the provisions of the Singapore-EU FTA fell within the EU's own external competence, with the exception of clauses on investor protection and investor-State dispute settlement. The UK-EU FTA contains no such clauses, meaning that the whole of the FTA (Part 2) falls within the EU's external competence. We have not formed our own view in the time available on the relationship between Part 3 (Law Enforcement and Judicial Cooperation in Criminal Matters) and the EU's external competence versus Member State competence. However, that is primarily a matter to be resolved on the EU side and it would appear that the Commission and Council's legal advisers must have concluded that the whole of the Agreement falls within EU competence. There are a number of UK Bilateral Investment Treaties with individual Member States whose status is now uncertain in view of EU Commission legal action being taken to force the UK to renounce them on the basis of the ECJ's *Achmea* judgment (Case C-284/16).

Fundamental rules of interpretation, and balance between sovereign equals

A number of principles are normal in international treaties in general, and in trade agreements in particular. These principles include that treaties are to be given a meaning which is independent of the laws of the treaty parties, and that treaty sovereigns never accept obligations to be bound by rulings of the courts or other organs of the other treaty party. Further, it is normal in trade treaties for obligations to be reciprocal, i.e. they contain clauses which impose equal obligations on both parties. One-way clauses imposing an obligation on one party in favour of the other are exceptional.

We are pleased that Article COMPROV.13 (Public international law) provides as follows:

1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.

2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.

3. For greater certainty, an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party.

This is complemented by Article INST.29(4) and (4A) (Arbitration tribunal decisions and rulings) which read as follows:

4. For greater certainty, the arbitration tribunal shall have no jurisdiction to determine the legality of a measure alleged to constitute a breach of this Agreement or of any supplementing agreement, under the domestic law of a Party. No finding made by the arbitration tribunal when ruling on a dispute between the Parties shall bind the domestic courts or tribunals of either Party as to the meaning to be given to the domestic law of that Party.

4A. For greater certainty, the courts of each Party shall have no jurisdiction in the resolution of disputes between the Parties under this Agreement.

We consider that the effect of the above clauses is in general to prevent the provisions of the Agreement from being automatically or presumptively interpreted in conformity with EU law or with EU law concepts. The fact that most provisions will be subject to a neutral international-law based interpretation means that we are far less concerned about the risk of clauses in areas such as the Level Playing Field (LPF) being distorted adversely to the UK by an overlay of EU law interpretations based on past or future judgments of the ECJ.[32]

That said, there are some areas where the language adopted in the agreement may give rise to inference that some Articles are based on and intended to replicate EU law concepts. In particular, we address later the specificity of tax measures (i.e. when a tax measure amounts to a subsidy) in Title XI Chapter 3 [Subsidy control] Art 3.1.2 (a), where the concepts are based on the ECJ's case law and effort will be required to avoid recreating in miniature an important aspect of the EU State aid regime.

For the most part, the provisions of the agreement are reciprocal and balanced, at least in formal terms. As a general matter the exceptions are in areas where reciprocal obligations would obviously not work, such as when the UK seeks to join an existing EU programme, in which case the UK must expect to follow the EU's rules for that programme while a member. The major exception is fisheries, where the UK will assume post-exit obligations towards the EU regarding UK waters which depart, for a 5.5-year transitional period, from normal reciprocal agreements between independent coastal states. There may also be some areas where provisions which are formally balanced are *de facto* unbalanced, such as subsidy controls which may arguably apply to the EU but not to the Member States – who control most of the resources - or the effect of minimum local content requirements in vehicle rules of origin, which is an issue we consider in Annex 1.

[32] Contrast, for example, the likelihood of Art.10 of the Northern Ireland Protocol which can only be authoritatively interpreted by the ECJ. There is a substantial risk that the ECJ will use its own case law on effect on trade between Member States when interpreting the test of "*affect that trade subject to this Protocol*" – notwithstanding the EU Commission's unilateral declaration in the joint committee issued on 17 December 2020.

Single framework and terminability

We note that the different parts of the UK-EU relationship (trade, law enforcement, and participation in EU programmes) are contained within a single agreement, and that further agreements ('supplementing agreements') will become caught within the same framework. We consider that this is in principle undesirable compared with having separate agreements on different subject-matters, since the EU has a habit of using large single agreements or linked agreements as a method of exerting control, particularly over its close European neighbours.

Switzerland encountered this problem when it was unable to implement its referendum decision to curtail free movement of persons because to do so would have meant having to terminate Switzerland's agreement with the EU on free movement of goods. The EU is seeking to tighten its control on Switzerland further by pressurising it into entering into a Single Institutional Framework agreement.

On the other hand, the risks arising from this structure are mitigated by the fact that Part 3 (Law Enforcement) is separately terminable on nine months' notice,[33] quite apart from the general right of either Party to terminate the agreement as a whole on one year's notice.[34]

The termination provisions are described in Annex 2.

[33] Article LAW.OTHER.136.
[34] Article FINPROV.8.

III
Goods and Agri-Goods
A State of the Art Free Trade Agreement

The TCA goes beyond ordinary arrangements of the World Trade Organisation (WTO) and is a state of the art trade agreement for goods and agri-products. The trade sections of the proposed agreement are comprehensive with respect to goods, eliminating tariffs and quotas across the board.[35] The agreement reiterates but does not go beyond WTO commitments on Sanitary and Phytosanitary (SPS)[36] and Technical Barriers to Trade (TBT)[37] measures, ensuring that non-tariff barriers will be no more trade-restrictive than necessary for the purposes of health and safety. The agreement stops short of granting mutual recognition for conformity assessment – despite the EU having such arrangements with other trading partners such as Korea, Canada and New Zealand, although it promotes the streamlining of customs procedures.[38] On trade remedies, while anti-dumping is unaffected (relative to WTO rules)[39] the agreement's subsidies chapter is more detailed, with enhanced notification and expanded definitions for both subsidy and specificity.[40] As expected, the services chapter is rather limited, granting very little beyond that which would be available under WTO terms. Compared to the General Agreement on Trade in Services (GATS), the EU-UK agreement has several gains. Under

[35] Title I Article GOODS. 5.
[36] Title I Chapter 3 SPS.
[37] Title I Chapter 4 TBT.
[38] Title I Chapter 5 Customs and Trade Facilitation. If CETA is the benchmark, CETA did not grant mutual recognition across the board as is often suggested. There are a number of inspections still required for agricultural products (see CETA Annex 5). In fact, Canada has complained that it is difficult to get certification for these issues because there are no qualified inspectors in parts of rural Canada. Much of the framework for mutual recognition on SPS between the UK and Canada is still "to be agreed at a later stage." Also, the TCA contemplates lists being provided of approved authorities for inspection in the future: "The exporting Party shall inform the importing Party of its list of establishments meeting the importing Party's conditions which shall be based on guarantees provided by the exporting Party." (TCA Article SPS.8) In short, in the most contentious area (agricultural products) the differences between the TCA and CETA are not enormous. On manufactured goods, CETA's mutual recognition for conformity assessment (laid out in a Protocol) is also incomplete. Notably it does not cover: medical devices, fuel burning appliances, rail equipment, PPE, although a framework is in place for their inclusion in the future.
[39] Title I Article GOODS.17.
[40] Title XI Chapter 3 Subsidy Control.

movement of natural persons (Title II, Chapter 4) the agreement covers several categories of personnel that are not included in GATS: independent professionals; short-term business visitors; and Graduate trainees (under intra-corporate transferees, ICTs). There is no automatic recognition of professional qualifications, although a framework for future negotiations on this issue is set out in extensive detail.[41] The provisions on recognition of professional qualifications are broadly in line with standard EU practice in its recent FTAs; the TCA sets out a framework for professional bodies to propose and the Partnership Council to develop and adopt the arrangements for recognition of professional qualifications. On investment, the agreement prohibits performance requirements as a condition of foreign investment[42] and rules out the requirement of a commercial presence for cross-border trade in services.[43] This does not apply to non-conforming measures listed in Annexes SERVIN-1 and 2. These will need to be considered on a country-by-country basis.[44] There are also modern rules on digital trade aimed at facilitating cross-border data flows, including the prohibition of data localisation requirements and rules ensuring the authenticity of electronic signatures,[45] although there is nothing on adequacy for dealing with personal data. From 1 January 2021, for a period of four months, the transmission of personal data from the EU to the UK will not be considered a transfer to a third country under EU law.[46] This means that data transfers can continue without interruptions in January. This period may be extended by a period of a further [two] months. The intention is to allow time for the EU to adopt adequacy decisions in relation to the UK.[47] Conventional exceptions, largely copying WTO language, and covering such issues as the environment and public safety, are found at the end of the trade chapters.[48]

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[41] Title II: Services and Investment. The TCA does however go further than CETA. The TCA has clear commitments on legal services, for example, allowing practise in an EU Member State under home country qualifications, whereas it is ignored in CETA. Moreover, the TCA prohibits the requirement of a local presence for the cross-border delivery of a service, which CETA expressly maintains: see fn 43 below.

[42] Title II: Article SERVIN.2.6: Performance requirements.

[43] Title II Article SERVIN.3.3: Local presence.

[44] Title II Article SERVIN 3.6.

[45] Title I Chapter 2: Article DIGIT.6.1 Cross-border data flows, Chapter 3: Specific provisions, Article DIGIT.8 Customs duties on electronic transmissions; Article DIGIT.10: Conclusion of contracts by electronic means.

[46] Part Seven: Article FINPROV.10A.

[47] Article 36(3) of Directive (EU) 2016/680 and Article 45(3) of Regulation (EU) 2016/679.

[48] Title XII: EXCEPTIONS Article EXC.1: General exceptions.

The central feature of the trade terms of the agreement is the abolition of customs duties (*i.e.* there are zero tariffs) on goods which originate[49] in the other Party,[50] subject only to limited exceptions. Nor are they allowed to impose quantitative restrictions (quotas).[51] The range of goods which are entitled to zero tariffs is wider than that in the EU's other trade agreements. For example, the EEA Agreement and the EU-Swiss FTA exclude agricultural goods, meaning that they bear tariffs. In terms of current trade patterns, this core provision of the TCA is of much greater benefit to the EU than to the UK. According to the latest available figures, the EU has a massive surplus of £97bn per year in goods trade with the UK.[52] However, the fact that EU exporters gain disproportionately from this central feature of the FTA does not mean that it is as such bad for the UK. Clearly, many UK exporters will benefit from zero tariffs on their exports into the EU. In due course if these arrangements are to be fully balanced on the basis of the present market dynamics, one would expect to see liberal access for UK services exports into the EU. It is possible that will arise through declarations of equivalence in financial services, which the EU has insisted should be a matter of unilateral discretion and on which its intentions are currently unclear.

Overall, the foundations for the future relationship contained in this agreement are ones which respect the UK's sovereignty and provide for future freedom of action as the UK sees fit.

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[49] The fact that the tariff concessions are limited to goods which originate within the Parties, as distinct from goods imported into them from third countries, is standard for free trade agreements. We consider the "rules of origin" later.

[50] Article GOODS.5 (p20).

[51] Article GOODS.10 (p21).

[52] ONS: Trade in goods: all countries, seasonally adjusted (15 January 2019): https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/uktradeallcountriesseasonallyadjusted. The UK is a service-based economy and has a (smaller) surplus in services trade with the EU of £23bn. So, the EU exports far more goods to the UK than go back in the opposite direction. Also, the EU's exports are heavily concentrated in high tariff sectors such as vehicles, agriculture and clothing. As a result, if there are zero tariffs between the UK and the EU, the EU's exporters stand to gain more than double the tariff reliefs which UK exporters will obtain for goods going in the opposite direction. The width of the zero-tariff concession (extending to virtually all goods) is also of benefit to the EU given their higher level of agricultural exports into the UK market than exports in the opposite direction.

IV
Level Playing Field Laws
What Implications for UK Law?

During the negotiations the EU wielded the concept of a 'level playing field' (LPF), suggesting initially that this required the UK to adopt and apply EU law, as interpreted by the EU's court, the CJEU – contrary to normal practice in international trade treaties. There were various LPF provisions inserted into the TCA which needed careful consideration from a sovereignty perspective.

We have considered, in particular, the potential impact of the LPF provisions because those obligations could potentially inhibit the ability of the UK to change or reform its own laws. Their restrictive effects could extend to laws and rules beyond those directly affecting goods and services exported into the EU market, and impact on the UK economy across the board and in trade with third countries. We would be worried about LPF provisions which, even if they did not formally restrict changes to UK laws, were to impose a risk of onerous economic penalties which would amount to an effective constraint on the exercise of sovereignty.

The LPF obligations in Title XI[53] contain as their main feature a 'rebalancing' mechanism through which either party may retaliate (in the form of the removal of tariff preferences) in the event that the other either lowers its standards, or does not match an increase in standards made by the first party, in areas of labour, the environment or subsidy control, as they impact on trade between the parties.[54] This is a novel mechanism, without precedent in a trade deal so far as we are aware.[55] In addition to the availability of tariffs for departures from the LFP, there is also the possibility for a limited reopening of these commitments, providing essentially for a long-term rebalancing system aimed at accommodating permanent regulatory divergence.

[53] At pp 179-217.
[54] Title XI: Article 9.4: Rebalancing.
[55] For example, the Canadian CETA text in Chapters 23 and 24 contains some general and high level clauses about the parties maintaining and improving their standards in labour and environmental law starting from the baseline of the date of the agreement, but does not contain the concept of one party following the other's changes or tariffs as a remedy.

The short-term rebalancing system is very narrow in its scope in that it has a high threshold for enabling tariff retaliation due to regulatory divergence. The divergence must be 'material' and any associated rebalancing must be based on 'reliable evidence' not 'mere conjecture.'[56] Retaliatory tariffs must be proportionate and time-limited according to what is 'strictly necessary.'[57] Furthermore, the rebalancing tariffs require the authorisation of an independent arbitral tribunal.[58]

Transgression of the LPF requirements allows the imposition of tariffs as an alternative to the removal of the 'unbalanced' measure. This means that the LPF field and rebalancing system permit legislative divergence to continue indefinitely even if a rebalancing tariff were to be authorised by the arbitrators. This preserves both parties' regulatory sovereignty, and allows the UK to navigate trade-offs between domestic legislation and tariffs. There are few precedents of independent panels or arbitrators upholding challenges in these areas, for example for 'non-regression' or for 'significant divergences' that cause 'material impacts' on trade or investment. The few cases that do exist (based on provisions in other FTAs) show that it is difficult to prove that changes to labour or environmental law have an effect on trade. The threshold for materiality under the TCA's rebalancing system appears to be a high one, affording limited scope for retaliation. In public international law 'material breach' of a treaty is one which violates 'a provision essential to the accomplishment of the object or purpose of the treaty.'[59] It is a breach so serious that it allows the other party to terminate the treaty. The phrase 'material impact' which appears in the TCA and differs from material breach nonetheless calls for an interpretation based on the ordinary meaning of the words.[60] Here again, the concept of material is one which contemplates a high threshold, synonymous with 'important, significant, essential.'[61] Moreover, the 'strictly necessary' standard for measures taken in response to such material deviations offers even less scope for the complainant. Under public international law the standard of 'necessity' is usually taken to mean that it is 'the only means for the State to safeguard an essential interest

[56] Title XI Article 9.4.2.
[57] *Ibid.*
[58] Title XI Article 9.4.3 b).
[59] Vienna Convention on the Law of Treaties, Art 60(3)b.
[60] Vienna Convention on the Law of Treaties, Art 31(1).
[61] Collins Dictionary Online.

against a grave an immanent peril.'[62] In the field of trade, 'necessity' under the GATT Article XX general exceptions doesn't offer much more room. It is understood to mean something close to indispensable; that there is no less trade-restrictive way to achieve the desired goal.[63] In short – the rebalancing system in the TCA as it is drafted is exceedingly narrow.

Overuse of the short-term rebalancing system can trigger a review of the LPF commitments.[64] This is the long-term component of the rebalancing measures, ensuring that the future relationship sees a regulatory uncoupling between the UK and the EU. For example, if the UK pursued more far-reaching environmental policies it may feel that EU business had an unfair advantage over time. In those circumstances, it may seek to activate the 'rebalancing' mechanism in the short term and apply tariffs; and in the longer term, it may seek to amend the economic agreement to take this into account.

Overall we think that this system should not have an effect which in practice equates to loss of UK sovereignty in these areas, as long as the UK government is prepared to be reasonably robust and to fight cases in arbitrations vigorously when required.

Subsidy Control

A subsidy must generate an effect on 'trade and investment' not on competition (except for airlines). This is different to EU State aid. Effects operate at two levels:

- On a lower level to trigger the subsidy provisions in the Agreement. It is unclear what this threshold is, although logically it must be higher outside the Single Market than the (in practice meaningless) test of effects between Member States under EU law.
- On a higher level, to trigger remedies under the Agreement. This will require a high evidential hurdle of significant negative effects.[65] Trade effects are difficult to show as effects of a given measure are not usually so great as to show up in this way. This is deregulatory for the UK compared to the EU's State aid regime.

[62] International Law Commission Articles on State Responsibility Art 25(1).
[63] Appellate Body Report, Korea Beef, WT/DS161/AB at [161].
[64] Title XI. Article 9.4.5.
[65] Title XI Article 3.12(5).

The reference to investment effects (in addition to trade) does constrain UK action, but only if there are significant effects and the fact of reciprocity in these provisions should prove helpful. It should stop subsidy in *e.g.* Slovakia moving jobs from Sunderland in the same way as it stops such a subsidy moving jobs from Bavaria.[66] The EU collectively has greater fiscal headroom and historic willingness to pay in order to compete in investment 'subsidy races' such as this, so reference to investment is likely to be net protective of the UK.

We address various specific topics in the context of subsidy control in Annex 3.

[66] This is also consistent with the regional development section of the separate and non-binding "Joint declaration on subsidy control policies" available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/94810 5/EU-UK_Declarations_24.12.2020.pdf.

V
Non-Trade Matters

The TCA sought to be more ambitious than an ordinary trade agreement. It sought to reaffirm the parties' commitment to human rights (with the European Convention on Human Rights (ECHR)), to provide for ongoing input from new bodies representing civic society, and the option for the UK to join EU programmes where the UK saw benefit in doing so. Each of these must be carefully considered for potential infringements of sovereignty.

- *Links to ECHR*. References to the ECHR are effectively declaratory, and – especially in relation to the Law Enforcement chapter – do not take us beyond, or 'embed', existing obligations.[67] To the extent that these are seen as conditions to the agreement, it could be argued that the key adherence is to the protection of fundamental rights (however provided for) rather than particular instruments. In other words, provided any future legislation broadly showed respect for the protection of fundamental rights, there would be no issue if they were to be was amended or replaced. The provision clearly states that existing obligations under the ECHR are not 'modified' by this agreement.

- *Role of European Arrest Warrants in the Law Enforcement chapter*. The total effect of the Law Enforcement chapter has meant that the EAW no longer applies to the UK. The new deal provides for a new system of surrender based on sovereign principles.[68]

- *Role of new civic society bodies.* There is a limited provision for these bodies in the Agreement.[69] These provisions replicate a common EU format that involves trade unions, business groups and nongovernmental organisations (NGOs) within their policymaking system. There is a need to ensure that these arrangements do not lead to the undue influence of certain groups and those organisations that fund them at the expense of Parliament.

[67] *E.g.* Article LAW.Gen 3, p.283.
[68] Title VII, p.312.
[69] Article INST.6 and Article INST.7.

- *References to EU law in side agreements (e.g. through EU Programmes).* Part five of the Agreement sets the terms for UK participation in EU programmes.[70] Joining these programmes involves the acceptance of the EU's oversight in the running of their programmes, including the European Anti-Fraud Office (OLAF).[71] We note that involvement in these agreements, and thus the role of EU law, is limited to the scope of the programmes and is voluntary. This does not raise any sovereignty questions. The Social Security heading[72] likewise raises questions of EU law. However, it is our view that these commitments are reciprocal and justifiable on the basis they provide stability.

[70] EU programmes entered into under Part Five p.265.
[71] Article UNPRO.4.2.
[72] Social Security p260.

ANNEX 1: Rules of Origin

The fact that zero tariff concessions apply only to goods which 'originate in' one of the parties is standard for an FTA, and necessarily flows from the fact that an FTA (unlike a customs union) leaves its parties free to decide on their own tariff policies on trade with third countries. If the tariff concession were not restricted to 'originating' goods, then exporters from third countries would be free to route their goods into whichever FTA party has lower or zero tariffs on imports from the third country and then send them across the internal border between the FTA parties.

This tariff avoidance problem applies not only where goods come from the third county in unaltered form, but also where comparatively minor operations are performed on the goods from a third country in free trade party A before they are exported into free trade party B. For this reason, so-called 'rules of origin' are applied to decide whether or not sufficient work or transformation has been applied to the goods within a free-trade party so as to count as 'originating' in that party for the purpose of enjoying the zero-tariff concession.

The rules of origin in the EU-UK agreement occupy 15 pages[73] of text in the body, together with 71 pages of the Annexes.[74] Given the tight timescale we worked under it was not possible to review these rules in any kind of detail, but we shall comment briefly on one aspect which is politically and economically important, namely the rules of origin for vehicles and for batteries for electric vehicles.

Vehicles are assembled from components and sub-assemblies (such as engines, or engines with gearboxes, etc). Where a car contains components some of which have been imported from outside the FTA parties, the method generally used in the EU's rules of origin is to put an upper limit on the value of non-local content. In the EU-UK FTA this limit is that the value of the imported parts and components must not exceed 45% of the ex-works value of the completed vehicle.[75]

This requirement to limit non-local content puts pressure on car manufactures to source more of their components locally. For this purpose, 'locally' means the

[73] See pp27-41.
[74] See pp415-485.
[75] See p466 at 87.01 "MaxNOM 45% (EXW)".

components are made within either Party to the FTA, because of so-called 'bilateral cumulation of origin', which is standard in FTAs and is in the TCA.[76]

In practice it is harder for UK-based car makers to achieve this local content requirement than for car makers in the EU, and it may cause particular difficulties for Japanese-owned car plants in the UK because parts from Japan would count as non-local content.

In this regard, the EU has adopted a discriminatory and protectionist posture by denying to the UK third country (so-called 'diagonal') cumulation of origin. This concept is contained in the Pan-European Mediterranean Convention on rules of origin ('the PEM Convention') to which the EU is party together with the neighbouring European and near-European countries with which the EU has FTAs. Under this concept, content which is manufactured in a third country with which both parties have an FTA relationship also counts as if it were 'local' content. Since both the EU and the UK have FTAs with Japan, the diagonal cumulation principle would suggest that Japanese content should also count towards the local limit.

However, the EU has refused to include 'diagonal' cumulation of origin in its FTA with the UK, despite it being in the EU-Japan FTA and in other EU FTAs such as that with Canada. The inference is that this has been done specifically to target Japanese-owned car plants in the UK.

In a further problem for UK car manufacturers, an additional rule of origin applies for electrically powered vehicles. The vehicle has to satisfy the same rule of not more than 45% non-local content, but in addition the battery pack also has to originate within the UK or the EU.[77] For the battery to satisfy the local content rules, a more stringent threshold of 30% non-local content will apply.[78]

This additional restriction on batteries in the rules of origin is likely to be of huge commercial importance given the UK's intention to phase out the production of non-electric vehicles. The impact of these restrictive rules has been mitigated although not eventually avoided by phasing arrangements in Annex ORIG-2A[79] which allow up to 70% non-local content in the batteries initially, phasing down to the 30% limit from 31 Dec 2026, although subject then to a review by the Trade Partnership Committee.[80]

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[76] Article ORIG.4, p.28.
[77] See 87.02-87.04, pp446-7.
[78] 85.07 on p464.
[79] See pp471-3.
[80] See pp476-7.

These aspects of the rules of origin do not in our view give rise to a sovereignty issue, as distinct from affecting the trade value of the agreement. Nonetheless, these provisions reveal an aggressively protectionist attitude on the part of the EU in which it seems very willing to depart from free trade principles in order to secure perceived advantages for its producer interests. This attitude on the part of the EU informs the way in which we must assess the likelihood of the EU seeking aggressively to exploit other provisions of the agreement, notably the LPF clauses, for protectionist reasons.

ANNEX 2: Termination Provisions

The UK's original negotiating approach aimed to strike separate agreements on different policy aspects rather than concluding an all-inclusive UK-EU treaty. The rationale behind this approach was that a sovereignty-compliant deal had to avoid locking the UK into a treaty with little manoeuvre on suspending or terminating particular policy aspects – as opposed to the treaty as a whole – if future circumstances so required. Whilst Government has ultimately negotiated a single FTA, it has nevertheless been successful in agreeing on provisions that, when necessary, treat different parts of the Agreement separately. These provisions are important as there are some aspects of the Treaty which include references to EU law and ECJ jurisdiction (e.g. membership of Union Programmes) or that adopt novel regulatory techniques with no strict precedent on whether their consequences drive us towards divergence as opposed to alignment (*e.g.* 'rebalancing' measures) and which therefore require legal avenues for the UK to protect itself from these risks. The termination clauses in the FTA are effective safeguards in this respect. Overall, the main issue with some of these provisions is that, once triggered, they can generate cross-termination of different Titles, meaning that termination in one area can affect others.

Part Two of the Agreement

Trade. Both the EU and the UK have the power to start a review on the operation of the trade section of the TCA (contained in Heading One [Trade] (and any other additional Heading)) no sooner than four years after the entry into force of the TCA.[81] A review of the agreement can lead to three outcomes:

1. the parties decide to keep to existing arrangements;
2. they decide to amend aspects of Heading One [Trade] (and any other additional Heading included in the review); or
3. if a long-term solution is not reached within one year from the start of negotiations, then the Trade Heading of the Agreement (including the LPF chapter) can be terminated by either party. Termination shall take effect three months after the date of the notice.

This provision is affected by cross-termination: if a Party terminates Heading One [Trade], Heading Three [Road transport] is also terminated on the same

[81] Article 9.4(4) p.216.

date.[82] In addition, Heading Two [Aviation] will also be subject to termination unless the Parties agree to integrate the relevant parts of Title XI [LPF] in Heading Two [Aviation].[83] However, valuable side agreements would remain in force.[84] Under option 3., the economic parts of the Agreement would be effectively replaced with WTO rules.[85]

Energy. The Energy Title ceases to apply on 30 June 2026 unless the Partnership Council decides it will apply until 31 March 2027 or, following an additional subsequent decision, until 31 March 2028.[86]

Aviation and Transport. Each party may at any moment terminate the Air Transport Title[87], the Air Safety Title[88] and the Transport of Goods by Road Title[89] by way of written notification through diplomatic channels. The Titles will cease to be in force on the first day of the nine months following the date of notification. Instead, the Transport of Passengers by Road Title shall cease to apply on the date the Protocol to the Interbus Agreement enters into force for the UK, or six months following the entry into force of the same Protocol for the Union (whichever is the earliest)[90] except for the purpose of specific transport service operations.[91]

Social Security. Ch.SSC.1[92] establishes that Members States and the UK shall coordinate their social security systems in accordance with the Protocol on Social Security Coordination. The Protocol includes a specific termination provision[93] allowing either party to terminate the Protocol at any moment by way of written notification through diplomatic channels, which protects the rest of the Agreement if the Protocol were to be challenged after the agreement has been ratified. In addition, a sunset clause in the Protocol[94] establishes that the Protocol shall cease to apply fifteen years after the entry into force of the

[82] Article 9.4(10) p.217.
[83] Article 9.4(11) p.217.
[84] Articles 9.4(4) and (5), (10) and (11), pp.216-217.
[85] Article 9.4(10)-(11) p.216-217).
[86] Article ENER.33 p 172.
[87] Article AIRTRN.24 and AIRTRN.25 p 239.
[88] Article AVSAF.16 p 245.
[89] Article ROAD.14 p 252.
[90] Article X+2(2); Article X+2(5); Article X+2(6) and Article X+2(7).
[91] Article X+12 p 259.
[92] At p.260.
[93] Article SSC.69.
[94] Article SSC.70.

Agreement and that the parties have an option to enter into negotiations with a view to concluding an updated Protocol.

Fisheries. Each party may at any moment terminate the Fisheries Heading, by written notification through diplomatic channels.[95] The Heading will cease to be in force on the first day of the nine months following the date of notification. However, this provision is affected by cross-termination: Heading One [Trade], Heading Two [Aviation], Heading Three [Road transport] and this Heading [Fisheries] shall cease to be in force on the first day of the ninth month following the date of notification.[96] Heading Two [Aviation] may remain in force, if the Parties agree to integrate the relevant parts of Title XI [Level Playing Field].[97]

Access to waters in respect of the territorial seas adjacent to the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man is treated separately – the Articles in respect to these territories continue to be in force unless notice of termination is given.[98] In case of their respective termination[99], any previously existing agreements or arrangements with respect to fishing by Union fishing vessels in these territories, and with respect to fishing by United Kingdom fishing vessels registered in those territories shall govern.[100]

Annex Fish 4. establishes an adjustment period lasting from 1 January 2021 until 30 June 2026 upon which the UK and the EU as independent coastal states grant mutual access to their waters for a set time period.[101] The adjustment period will feature annual negotiation on Total Allowable Catches shares and further specific access conditions specified in Article FISH.8(2). At the end of the 5.5-year period, the UK will enjoy all the powers and abilities other independent coastal states enjoy. Thus, the UK will have a right to deny access to water to the EU, but this might result in compensatory measures taken by the EU.[102] The compensatory measures are limited to the economic and societal impact of denying access and can only take the form of reciprocal denial of access and tariffs on fisheries products. Those consequences would be strictly calibrated to the extent to which one party denied access to its waters to the other in the future.

[95] Article FISH.17(1) p 273.
[96] Article FISH17(2) p 273.
[97] Article FISH 17(3) p 273.
[98] Article FISH 17(4)(a) p 273.
[99] Article FISH 17(4)(a)(i) and (ii) p 273.
[100] Article FISH 19 p 274.
[101] Annex Fish 4 Article 1 p 899.
[102] Article FISH.9 pp. 267-268.

Part Two Termination Provision. There is a general Termination provision for Part Two [Trade, Transport, Fisheries and Other Arrangements] of the Agreement.[103] Each Party may at any moment terminate all of Part Two of the Agreement, by written notification through diplomatic channels. Part Two shall cease to be in force on the first day of the ninth month following the date of notification, excluding Heading Four [Social security coordination and visas for short-term travels] and the Protocol on Social Security Coordination. This, therefore, includes termination of the Trade, Aviation, Road Transport, Fisheries, and Other Provisions Headings, whilst maintaining the rest of the Treaty intact.

Part Three of the Agreement

Part Three Termination Provision – Each party may at any moment terminate the Law Enforcement and Judicial Cooperation Part by written notification through diplomatic channels and the Part will cease to be in force on the first day of the ninth month following the date of notification. If the Part is terminated on account of denouncing the European Convention on Human Rights or Protocols 1, 6 or 13 by the UK or an EU MS, the Part will cease to have effect when denunciation is effective or 15 days following notification of termination.[104]

Law Enforcement and Juridical cooperation on Criminal Matters – With specific reference to the exchanges of DNA, fingerprints and vehicle registration data Title,[105] if the EU considers amendments to this Title are necessary, it can notify the UK with a view to reaching an agreement following consultation. If within nine months of that notification the Parties have not reached an agreement, the EU may decide to suspend the Title for a period up to nine months (which the parties may agree to extend for an additional nine months). If no agreement is reached, either the EU informs the UK that it no longer seeks to amend the Title or the suspension subsists. Similarly, both the EU and the UK may notify the other of its intention to suspend the application of the transfer and processing of passenger name record date Title[106] and then engage in consultations. If within six months the two parties have not reached a resolution, either party may decide to suspend the application of the Title for a period of six months (that can be further extended by an additional six months). The Title

[103] Article OTH.10 (p 281).
[104] Article LAW.OTHER.136 p 365.
[105] Article LAW.PRUM.19 p 290.
[106] Article LAW.PNR 38 p 300.

shall cease to apply on the first day of the month following the expiry of the suspension period if no agreement is reached. The Specialised Committee on Law Enforcement and Judicial Cooperation shall meet to decide what steps are needed to ensure that any cooperation initiated under these Titles and affected by the suspension. Both parties shall ensure that the level of protection under which the personal data transferred under these Titles is maintained after the suspension takes effect.

Part Four of the Agreement

Health Security – If the EU considers that the UK has not observed all the applicable conditions for the use of the Early Warning and Response System (EWRS) or the rules of procedure of the committee it may terminate the access of the UK to the EWRS or its participation in that committee.[107] If the UK considers that it cannot accept the conditions or rules of procedure of the EWRS, it may withdraw its participation in the EWRS or its committee.[108]

Part Five of the Agreement

Participation in Union Programmes – The Union has the power to suspend[109] and subsequently terminate[110] the participation of the UK in a Union Programme (under Protocol I) if the UK either fails to pay its financial contributions or unilaterally introduces significant changes to a condition that existed when the UK participation in a programme was agreed. The UK may also unilaterally terminate its participation in a Union programme[111] if the basic act of that Union Programme is amended to an extent that the conditions for participation of the UK are substantially modified or if the total amount of commitment apportions is increased by 15% compared with the initial financial envelope. Following suspension/termination the UK will no longer be treated as a participating member of the Union programme but suspension/termination shall not affect legal commitments entered into before the initial suspension. The UK's outstanding financial contributions will be calculated accordingly.

Part Six of the Agreement

Termination based on a breach of an essential element of the Treaty[112] **–** If either Party considers that there has been a serious and substantial failure by the

[107] Article HS.1(a) p 362.
[108] Article HS.1(b) p 363.
[109] Article UNPRO.3.1 p 372.
[110] Article UNPRO.3.2 p 374.
[111] Article UNPRO.3.3 p 375.
[112] Article INST.35. p.400.

other Party to fulfil any of the obligations that are described as essential elements in Article COMPROV.12 [Essential elements], it may decide to terminate or suspend the operation of this Agreement or any supplementing agreement in whole or in part. The gravity and nature of the breach would have to be of an exceptional sort that threatens peace and security or that has international repercussions. The provision clearly stipulates that an act or omission, which materially defeats the object and purpose of the Paris Agreement, will always be considered as a serious and substantial failure for the purposes of this provision.

Part Seven of the Agreement

General Termination Clause – Under Article FINPROV.8[113] either Party may terminate this Agreement by written notification through diplomatic channels. This Agreement and any supplementing agreement shall cease to be in force on the first day of the twelfth month following the date of notification.

[113] See p.405.

Member State vs EU spending

Since the parties to the TCA are the EU and the UK, and Title XI Chapter 3 [Subsidy Control] only applies to subsidies which 'arise from the resources of the Parties'[114]; there is some doubt about whether the constraints of the TCA apply to spending by the Member States (who are not themselves parties to the Agreement).

This appears to be a drafting matter. Since the very purpose of this vexed Chapter on subsidy control was to achieve a 'level playing field' it would be inconceivable for the constraints to apply to UK spending but not to (say) France or Germany. Were the EU to attempt such an interpretation – for example in approving aid that breached the principles in Title XI Chapter 3.4 on the basis that the resources involved were Member State not EU resources - the UK would have to take immediate and very assertive political steps in response.

This is an issue that will need to be remedied formally at the four-year review cadence.

Tax

Title XI Article 3.1(2) adopts the EU's 'reference framework' terminology in applying State aid rules to tax measures. This is a term which the ECJ has developed, and despite the ECJ having no formal role in interpretation within the TCA, the concepts are entirely creations of the ECJ and are not replicated in any other judicial system so far as we are aware. It will be hard therefore to give such provisions an autonomous meaning. The point will need careful handling to ensure that HMRC tax rulings for investors cannot later be undermined.

The EU's 'reference framework' is a highly controversial attempt to use State aid to mitigate tax competition between Member States. Since direct taxation (unlike VAT) is not harmonized in the EU, Member States are able to use low tax rates to compete for inward investment. Companies locating in low tax Member States can then use rights under the single market to sell across the EU, while booking the profits of such sales through the low tax jurisdiction. Ireland, the Netherlands and Luxembourg are the most prominent users of this strategy.

In the absence of harmonisation measures for tax rates (which can be vetoed by a single Member State), the Commission has brought a series of cases against Ireland, Luxembourg and the Netherlands. These allege that individual tax

[114] Art 3.1 b) i

measures or tax rulings – essentially confirmations from national tax authorities about how a particular fact pattern should be treated under the tax laws – amount to aid. The 'reference framework' is the way the ECJ has devised a legal scheme to assess these cases. However, it is a test that is practically impossible to apply to a given set of facts in a predictable manner, introducing complexity and uncertainty into the tax regime. This is especially so for digital goods and services where profits are highly mobile internationally and tax residence typically depends on tax rulings approving the particular firm's transfer pricing arrangements. The ECJ case law is also fluid – at least with respect to an evidentiary standard that has to be met to challenge a tax measure - following the General Court's quashing of the *Apple*[115] decision and the Commission's pending appeal. The arguments against the 'reference framework' concept are neatly explained by the ECJ's own Advocate General Øe in *Brauerai*[116], although the Court ignored him. The main problem is that there is no limiting principle – only the ECJ many years after the event is capable of providing a reliable answer as to what the treatment of a given measure should be:

> 'I confess to having some concerns as regards the practical consequences of the use of the reference framework method, both in substantive and formal terms. (11) In particular, it appears to me that that method risks extending the rules on State aid to any tax differentiation, by encouraging a review of the tax systems of the Member States in their entirety with a view to finding instances of discrimination.'

Even leaving aside the lack of ECJ jurisdiction in the TCA, by importing such a flawed structure into the TCA, UK tax measures – especially those that may discriminate e.g. between multi-national and domestic firms, or between digital and non-digital sales or between treatment of tangible and intangible assets, are vulnerable to challenge. This challenge could be obvious – in court or by the EU under the terms of the TCA; or it could be more subtle. The civil service may – accurately and in good faith – provide advice to ministers that a particular tax measure may not be consistent with the TCA. This may dampen the UK's ability to use the tax system to compete by preventing more ambitious or sharply competitive measures from being proposed in the first place.

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[115] Cases T-778/16, Ireland v Commission, and T-892/16, Apple Sales International and Apple Operations Europe v Commission.

[116] Case C-374/17 Finanzamt B v A-Braueri, opinion available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=61CC9049C7F4C0876E155577D5954005?text=&docid=205886&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=17567569.

The TCA provisions in this context require opening a discussion on what the UK's 'normal system of taxation' is; whether a particular measure is a part of or an exception to that normal system; what the objective of that system is; and whether a particular measure is justified by 'principles inherent to the design of the general system.' Each limb of the test cannot be reliably be applied in advance by taxpayers, or HMRC or Treasury in the design of new tax measures. Reasonable people can reasonably disagree and come to opposite conclusions on every limb of the test. For example, in *Brauerai*, there was a dispute about the third limb – what is the objective of the German tax system relating to the transfer of land. According to the Advocate General[117], the company considered '*the purpose of the tax on the acquisition of land is to tax the acquisition of control over a property located in Germany*.' Whereas Germany considered: '*the purpose of the tax on the acquisition of land is to tax the objective financial capacity of the purchaser or the vendor of property which becomes apparent where assets are transferred*'. Lastly, the Commission considered the tax system was '*intended to tax all transfer transactions which result — legally or economically — in a transfer of ownership*'.

Of course, all this is arbitrary nonsense. A tax system has many objectives – representing necessary trade-offs rather than a hierarchy. The party defending a given tax treatment under the reference framework will choose an objective favourable to them (attracting investment, achieving competitiveness internationally); the party attacking the tax measure under the reference framework will choose another objective (equity between taxpayers or widening the tax base or maximizing tax take).

The concern is not much helped by the 'effects' test in the definition of subsidy, as tax measures can be such significant drivers of investment – especially in the digital sectors. Using the tax system to attract digital companies can still be done within the EU (see Ireland and Netherlands) but – depending on what the ECJ does in *Apple* - in a more costly way e.g. through low prevailing rates rather than targeted treatment of e.g. IP transfer pricing.

Title XI Article 3.1(2) imports bad law into the UK. Unless a very assertive approach is taken by Government, the UK could easily get bogged down in conservative interpretations of what is permitted under this provision. Great care will be needed to ensure that the UK's freedom to compete via the tax system is not undermined by this provision.

[117] Case C-374/17 Finanzamt B v A-Brauerei, AG Opinion recital 132 *et seq*.

COVID-19 and Climate change exemptions

Title XI, Article 3.2 contains a significant exemption to subsidy control for 'exceptional non-economic occurrences'. This is presumably intended to mirror the EU State aid provisions for natural disasters in Article 107(2)(b) TFEU. It provides the parties with room to aid the economy in its recovery from COVID-19 – but it could plausibly also be used for climate response. Much of the discretionary spending in the EU budget for the next MFF is allocated to these policy priorities and would therefore be excluded from the controls of the agreement. Spending under this exemption could be targeted at competing against the UK without the protection of the subsidy control provisions.

Principles for subsidy control

Title XI Article 3.4 requires the UK to have a domestic subsidy control regime that assesses subsidies against agreed principles. This regime need not be an *ex ante* regime like the EU's (*i.e.* one requiring notification and approval before spending can proceed). The concepts behind the principles derive from EU State aid law. However, they are sensible policy objectives for any subsidy control regime provided the concepts are given an ordinary meaning and Commission and ECJ case law are not applicable (as explained above):

- subsidies pursue a specific public policy objective to remedy an identified market failure or to address an equity rationale such as social difficulties or distributional concerns ('the objective');
- subsidies are proportionate and limited to what is necessary to achieve the objective;
- subsidies are designed to bring about a change of economic behaviour of the beneficiary that is conducive to achieving the objective and that would not be achieved in the absence of subsidies being provided;
- subsidies should not normally compensate for the costs the beneficiary would have funded in the absence of any subsidy;
- subsidies are an appropriate policy instrument to achieve a public policy objective and that objective cannot be achieved through other less distortive means;
- subsidies' positive contributions to achieving the objective outweigh any negative effects, in particular the negative effects on trade or investment between the Parties.

The principles will have a direct effect in the UK. i.e. the legality of HMG spending decisions can be tested by companies in the UK Courts against these principles (Title XI Art 3.7(5)).

Rescue and restructuring aid

There are limits on rescue aid but no carve-outs for specific sectors (like steel) that exist in the EU rules. This will limit to some degree HMG's ability to bail out politically sensitive manufacturers. Those bailouts could be challenged directly in the UK Courts. Notably, however – as a TCA matter at least - the standing rules for Court in Art 3.7(6) are tight: only real competitors and trade associations have standing, not NGOs or self-styled 'public interest' litigators.

Large cross-border or international cooperation projects

Title XI Article 3.5.13 carves out subsidies for large cross-border or international cooperation projects. This is probably to permit the EU to fund Important Projects of Common European Interest (IPCEI) outside the control of the agreement, such as the €3.2bn of subsidy spent on creating an EU battery supply chain.[118] The cumulative effect of this, plus the agriculture, Covid and other non-economic crisis (i.e. climate), and audio visual exclusions is to take the vast majority of EU discretionary spending outside the control of the Agreement – EU spending on regional development and R&D appear to be included. These provisions are nominally reciprocal, but in practice remove more protection from the UK than from the EU, since a far greater proportion of EU spending is within the exempted categories.

That said, while IPCEI projects are big and a substantial number are in the pipeline they are also slow and of unproven effectiveness as it is so difficult to comply with all the requirements.[119]

Domestic Procedure

The UK must have legislation granting the UK Courts powers to quash measures granting subsidy in breach of the agreement. This does not apply to any subsidies

[118] See: https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6705.
The EU-demanded restrictive Rules of Origin on battery driven vehicles which we consider in Annex 1 above are obviously related to this project and are intended to place pressure on UK-based vehicle manufacturers to source their batteries from within the EU.

[119] See: Joint statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain at the 6th Ministerial Meeting of the Friends of Industry, at:https://www.bmwi.de/Redaktion/DE/Downloads/F/friends-of-industry-6th-ministerial-meeting-declaration.pdf?__blob=publicationFile&v=6.

pursuant to Acts of Parliament.[120] The EU and UK will have the standing to intervene in existing cases, but do not appear to have original standing in each other's courts. It is unclear how this operates in an EU context, in particular whether it relates to just the CJEU or if there are intervention rights before the courts of Member States (although the latter would historically be very unusual).

Domestic Remedies

The UK is obliged to implement recovery (i.e. repayment of the aid plus interest by the beneficiary to the State) as a remedy. This matches the State aid system, except it does not apply to aid under Acts of Parliament or under EU legislation. This means that the EU can grant subsidies under its own schemes without the obligation to collect repayment from beneficiaries, although it would still amount to a breach of the TCA permitting retaliation in the form of suspended concessions, i.e. tariffs.

The ability to exclude Acts of Parliament from recovery is important – especially for economic infrastructure projects (toll roads, bridges, broadband, 5G, airports, nuclear power, etc) financing of which can be plagued in the EU by State aid claims from those opposing them for many years. While these projects ought to have been excluded from the TCA entirely, as they are excluded from the WTO SCM Agreement,[121] this is an improvement for the UK versus the EU State aid rules.

Unilateral inter-party remedial measures

Title XI Article 3.12 concerns retaliation for an individual subsidy measure. There is the reciprocal ability for structured unilateral retaliation without the prior authorisation of an arbitration tribunal. But the threshold is high – '*serious risk that it will cause, a significant negative effect on trade or investment between the Parties*'. This is further defined as: '*based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances that would create a situation in which the subsidy would cause such a significant negative effect must be clearly predictable.*' This can be defined as a 'blacklist' by the Partnership Council in the future – i.e. to identify subsidy types that would fall on a *per se* basis into this category. One obvious place this may assist the UK is if subsidy to move existing jobs was considered blacklisted – preventing EU or Member States paying e.g. Nissan to move jobs to Renault in Eastern Europe or France.

[120] Article 3.11(5).
[121] Article 1.1(a)(1)(iii) of the WTO Agreement of Subsidies and Countervailing Measures.

Arbitration

The time periods for arbitration are extremely short. The arbitration tribunal shall have no jurisdiction to determine the legality of a measure alleged to constitute a breach of the TCA under the domestic law of either party.[122] Moreover, no finding made by the arbitration tribunal when ruling on a dispute between the Parties shall bind the domestic courts or tribunals of either party as to the meaning to be given to the domestic law of that Party. It goes on to state that the courts of each Party shall have no jurisdiction in the resolution of disputes between the Parties under the agreement.[123] These provisions underscore that there is no role for the ECJ in resolving disputes under the agreement. Many of the procedures for arbitration under the TCA are yet to be determined, although some elements are clear. For example, the tribunals will be composed of three people and both parties will submit lists of eligible arbitrators within 180 days from the TCA entering into force. Arbitrators must have experience in law and international trade. Interestingly, deliberations of the arbitral tribunal shall be kept confidential. Decisions of the tribunal shall be made public once they have been issued although dissenting opinions will not be disclosed.[124] This is broadly similar to investment arbitration and WTO dispute settlement.

Suspension of agreement / rebalancing

The arbitral tribunal has to authorise the suspension or rebalancing of parts of the agreement in accordance with Article INST.34B. This retaliation can apply across different areas of the agreement (Article INST 34D [conditions for rebalancing] and INST.10 [Scope]). For example, the EU may close its market to shellfish in retaliation for the subsidy to cars. However, this must be proportionate to the harm caused by the subsidy that has been granted in breach of the agreement. The cross-retaliation permits the EU and the UK to choose the most politically sensitive areas against which to take retaliatory steps.

The rebalancing arrangements (at Article 9.4: Rebalancing) discussed above also apply to subsidy policy more generally.

[122] INST. 29.
[123] INST. 29.3 and 29.4.
[124] See generally Article INST.27.

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David Collins

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The Irish Border, Brexit & the EU – The Route to Frictionless Trade
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Now or Never: Countering the Coup Against Britain's Democracy
Sheila Lawlor

Leave as You Entered: Brexit in International Law
Thomas Grant

Avoiding the Trap – How to Move on from the Withdrawal Agreement
Martin Howe, Richard Aikens and Thomas Grant

When Boris Johnson struck a trade deal with the EU, many asked, 'Is it a true Brexit deal for the UK?' Attention turned to the opinion of a group of lawyers who advised the pro-Brexit European Research Group of MPs.

The Lawyers Advise - UK-EU Trade and Cooperation Agreement: Unfinished Business? presents a full version of that opinion specially prepared by Martin Howe QC, Barnabas Reynolds, James Webber and Professor David Collins, lawyers who specialise in EU and global regulatory and trade law, who were involved in the December advice.

They explain that the TCA was consistent with sovereignty, but highlight two matters of unfinished business, the 2019 Withdrawal Agreement and its Northern Ireland Protocol, the other concerning fisheries. The opinion also discusses how, legally, the agreement is constructed and may work in practice.

It is preceded by an analysis by Dr Sheila Lawlor, a historian, and Politeia's Research Director, who assesses the political and constitutional developments following the 2016 poll.

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