The European Research Group's Legal Advisory Committee Opinion on the UK-EU Trade and Cooperation Agreement

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The essential question before us is the following: is the Agreement sovereignty compliant as a matter of law? We have concluded that it is for the following reasons:

- The Agreement reaffirms the sovereignty of the United Kingdom.
- There is an independent arbitrator panel for any disputes.
- The meanings of the provisions are autonomous under international law and do not reference EU law or jurisprudence of the European Court of Justice. Nor does the Agreement provide a role for the ECJ (except for EU programmes which the UK chooses to opt into) and the EU approach of provisions having "direct effect" in UK law is excluded.
- The Agreement contains a provision for termination on 12 months' notice.
- During the operation of the Agreement, the UK remains free to make its own laws, subject to potential tariff and trade consequences if these significantly distort trade between the UK and the EU.
- The UK cannot be subject to arbitrary or disproportionate retaliation unrelated to effects on trade.

We have also considered issues of practical sovereignty and have concluded this is essentially protected for the following reasons:

- *Subsidy control:* The subsidy control regime is not based on the highly prescriptive and intrusive EU State aid rules. The right of the other party (i.e. the EU in the case of a UK subsidy) to challenge a measure it contends to be a subsidy is limited to cases where it can demonstrate, based on facts, that there is a serious risk of a significant negative effect on trade or investment between the parties. If so, it can impose "necessary and proportionate" remedial measures, i.e. countervailing tariffs, but these steps are subject to arbitration. The UK is not required to subject Acts of Parliament to domestic review in the courts.
- *Non-regression:* The Agreement provides that the parties "*shall not weaken or reduce, in a manner affecting trade or investment between the Parties*" their labour, social, or environmental levels of protection below the levels in place at the end of the transition period. Since the UK's and the EU's laws in these fields will be very closely aligned at the end of the transition period,

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there may be a concern that these clauses could constrain the UK against reforms to its laws in these fields which might involve some aspects which could be said to "weaken or reduce" standards. However, any change has to be "material", which is one that affects the fundamental purpose of the treaty, and it has to be proven to affect trade and investment. The apparent effect of these clauses is also attenuated by other clauses which affirm the right of each party "*to adopt or modify its law and policies in a manner consistent with each Party's international obligations*". Furthermore, Article 1.1(4) expressly recognises that the purpose of these provisions "is not to harmonise the standards of the Parties". The non-regression clauses are enforced via a special "panel of experts" procedure. Non-compliance with a panel ruling that a measure "regresses" from these standards could lead to a right of the other party to take "temporary measures" suspending parts of the Agreement.

- *Rebalancing.* Where a divergence arises between the laws of the parties in the fields of environmental, climate, labour and social law, and subsidy control, there is a mechanism for "rebalancing" the trade effects of that divergence by removing or restricting tariff preferences. The mechanism can apply when one party changes its law in a way which arguably "reduces" standards, or when the other party changes its law to "increase" standards, but is not followed in that change by the first party. This potential to be penalised for not following changes made by the other party could give rise to concern that the UK might be forced into a position of being a "rule taker", having no practical control over future EU decisions on changes to its laws but nevertheless effectively obliged to follow them.

  However, "rebalancing" tariffs can be challenged in an arbitration panel before they can be imposed, and if they are authorised then the party concerned is not required to change its law, but can choose to live with the tariffs. Furthermore, the tariffs can only be "proportionate" to any trade effects of the divergence which are demonstrable by evidence. In practice, it is hard successfully to demonstrate this kind of linkage to trade effects before international tribunals. We think that as long as a UK government is willing to be robust and to defend with vigour any arbitration proceedings launched by the EU, then the rebalancing mechanism is less likely to give rise to a serious, effective constraint on practical UK sovereignty to revise our own laws in these fields.

We comment on further areas of the Agreement as follows:

- **Fisheries.** The Agreement provides for continued access by EU vessels to UK waters (i.e. the UK's territorial waters and its Exclusive Economic Zone) during a 5½ year period up to mid-2026, during which EU vessels are to have defined, but progressively declining, shares of the Total Allowable Catches of fish species as specified in the Annexes. This aspect of the Agreement temporarily limits the exercise of the UK's sovereign rights over its waters that would apply in the absence of the Agreement.

  However, the Agreement does not require the UK to continue to follow and apply the Common

Fisheries Policy rules. Furthermore, and importantly, the UK may modify the rules, *e.g.* to strengthen conservation, subject to the constraint that it may not discriminate between UK and EU vessels in the rules which it applies.

At the end of this transitional period, the UK will have the legal right to take full control of its waters, despite a question mark introduced by the last column in the table in Annex FISH.1 (p893) being headed "2026 onwards". After that time the EU may impose tariffs on UK fish exports to the EU, and EU leverage may also include the termination of the energy title and the transitional, less restrictive rules of origin for electric batteries. The question of practical sovereignty is therefore dependent on the preparedness and robustness of the UK Government's response at that time, which we are confident they will achieve.

- **Northern Ireland.** Much of this Agreement does not relate to Northern Ireland as a result of the Northern Ireland Protocol to the 2019 Withdrawal Agreement. The Protocol and other parts of the Withdrawal Agreement currently remain in place whether or not this Agreement is ratified. The Protocol provides for continuing direct jurisdiction of the European Commission within Northern Ireland and binding ECJ jurisdiction. It leads to checks being required between Great Britain and NI. The position has been somewhat ameliorated by recent agreements in the Joint Committee.
- **Criminal Justice.** The European Arrest Warrant is replaced with a new system of "surrender", with added domestic legal safeguards.
- **Human Rights.** The Agreement includes references to the European Convention on Human Rights and a presumption within Part 3 of the Agreement, on Law and Criminal Justice, that the UK will continue to implement the Convention in its domestic law. Were the UK to maintain its respect for the principles of the Convention but to implement those principles in a different way, by amending the Human Rights Act 1998 or by withdrawal from the Strasbourg Court jurisprudence, it appears this would not be prevented by the Agreement but could potentially give rise to a right on the part of the EU to terminate Part 3. Part 3 can also be independently terminated by either party on 9 months' notice without bringing to an end the trade and other parts of the Agreement.

Conclusion. Our overall conclusion is that the Agreement preserves the UK's sovereignty as a matter of law and fully respects the norms of international sovereign-to-sovereign treaties. The "level playing field" clauses go further than in comparable trade agreements, but their impact on the practical exercise of sovereignty is likely to be limited if addressed by a robust government. In any event they do not prevent the UK from changing its laws as it sees fit at a risk of tariff countermeasures, and if those were unacceptable the Agreement could be terminated on 12 months' notice.

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