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# *Part Three of the EU-UK TCA – From a 'Disrupted' Area of Freedom, Security and Justice to 'New Old' Intergovernmentalism in Justice and Home Affairs?*

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**Abstract:**
During membership, the UK was the leading protagonist of 'disrupted integration' within the Area of Freedom, Security and Justice. Part 3 of the Trade and Cooperation Agreement (TCA) replaces differentiation with a 'new old' form of intergovernmental cooperation in justice and home affairs. The substance does simulate – to varying degrees – the EU law acquis in areas such as Passenger Name Records, Europol and Eurojust, and extradition. The protection of fundamental rights – in particular on data protection – has been embedded into the provisions. Part 3 also mandates future dynamic development of EU-UK security cooperation. However, the structures for governance and dispute resolution exclude any role for supranational political and legal institutions. Instead, the paradigm of diplomatic intergovernmentalism of the old Third Pillar of the European Community has been resurrected.

**Keywords:** Brexit – TCA – Justice and Home Affairs – AFSJ – EU-UK future relationship

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## 1. Introduction

Until the Withdrawal Agreement came into force on 31 December 2020, the United Kingdom was the leading protagonist of 'differentiated integration' within the Area of Freedom, Security and Justice (AFSJ).[1] The Member State enjoyed a discretion to 'opt-in' to pre-existing or proposed legislative measures falling under Title V of Part Three TFEU[2] that supplemented the powers of its security institutions, in tandem with the discretion to continue opt-outs from legislation that may be regarded as 'compensatory measures'[3] for the benefit of individuals. The asymmetry means that this now historical position may be regarded critically as 'disrupted integration'.[4] The UK ensured the application of the supranational area of security for the benefits of its own nationals, without undertaking its duties to ensure an area of supranational freedom and justice for all EU citizens and Third Country Nationals.[5]

A pathway dependence may have enabled such an asymmetric situation – whereas the norms on border checks, immigration and asylum originated in the international law Schengen Agreement, the norms on police and judicial cooperation in criminal matters originated at the Maastricht amendment. These distinct pathways were also reflected in different mechanisms being used by the United Kingdom to opt in and opt out from these particular sectors of the AFSJ.[6] The United Kingdom's block opt-out and tailored opt-ins from police and judicial cooperation were realised through Protocol (No 36). Its opt-ins and opt-outs from border and asylum policies were originally realised through Protocol (No 19) and (No 21), before these Protocols then became applicable to all such measures proposed under the AFSJ legal titles after Lisbon.

The legacy of this differentiated engagement with the different limbs of the AFSJ has been borne out through Part Three of the Trade and Cooperation Agreement (TCA) mandating co-operation purely in the field of law enforcement and judicial cooperation – corresponding to Chapters 4 and 5 of Title V TFEU[7] – without any such continuation for the sector of border checks, asylum and immigration or judicial cooperation in civil matters – corresponding to Chapter 2[8] and Chapter 3 respectively. This paper will assess the new intergovernmental basis for EU-UK justice and home affairs cooperation along two dimensions: the substance of the actions that are authorised in section 2, and the legal structure framing these norms in section 3. The central argument is that, although residues of the supranational constitutional AFSJ may be detected in the subject-matters of cooperation, and even in some of the legal 'meta-principles' regulating executive action, Part 3 of

[1] See *inter alia* Deirdre Curtin, 'Brexit and the EU Area of Freedom, Security and Justice: Bespoke Bits and Pieces' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017); Bruno De Witte, Andrea Ott and Ellen Vos, *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017); Jörg Monar, 'The "Area of Freedom, Security and Justice": "Schengen" Europe, Opt-Outs, Opt-Ins and Associates', *Which Europe?* (Palgrave Macmillan, London 2010) <https://link.springer.com/chapter/10.1057/9780230289529_19> accessed 8 September 2017.

[2] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 Part V, Title Three-Area of Freedom, Security and Justice.

[3] Steve Peers, *EU Justice and Home Affairs Law: EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law* (Fourth Edition, Oxford University Press 2016).

[4] Oliver Garner, 'Constitutional Disintegration and Disruption : Withdrawal and Opt-Outs from the European Union' (Thesis, European University Institute 2020) <https://cadmus.eui.eu//handle/1814/67670> accessed 11 January 2021.

[5] Nadine El-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar Publishing 2017); Maria Fletcher, 'EU Criminal Law Flexibility: What Lessons from the UK Protocol No. 36 Saga?' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016).

[6] See Bruno De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in Bruno De Witte, Andrea Ott, and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in the EU* (Edward Elgar Publishing 2017).

[7] Chapter 4 – Judicial cooperation in criminal matters; Chapter 5 – Police cooperation

[8] Chapter 2 – Policies on border checks, asylum and immigration; Chapter 3 – Judicial cooperation in civil matters.

the TCA represents a transformation in such relations to a 'new old' form of intergovernmentalism that revises the looser constitutionalism of the EU before the Treaty of Lisbon.

## 2. The Substance: Titles II-XI – supranational AFSJ simulation or new public international law intergovernmental co-operation?

Part Three of the TCA constructs a matrix of permissions, obligations, and restrictions.[9] Permissions for UK, EU and Member State bodies can be identified by the use of the verb 'may' and obligations likewise through the verb 'shall'. These permissions and obligations are subject to safeguards protecting individual rights. This incorporates 'negative liberty'[10] of individuals as an internal constraining factor on the new pooling of resources of executive institutions responsible for security. A balancing act between collective security and individual freedom runs throughout Part 3. Its provisions only mimic the police and judicial cooperation limb of the AFSJ, which was the subject of the United Kingdom's wholesale opt-out and tailored opt-ins in 2014.[11]

The claim is made that Titles II to XII of Part 3 TCA construct 'simulacra' of sectors of AFSJ co-operation. These simulacra move along a continuum from the more supranational – enabling United Kingdom participation in mechanisms and institutions that are authentic creatures of EU law[12] – to the more intergovernmental, whereby provisions are explicitly defined as supplements to pre-existing international law conventions.[13] The predicate for Part 3 of the TCA constituting a new form of intergovernmental co-operation, rather than replication of the AFSJ, is the transition from legal action on internal security operating within a holistic supranational constitutional space to tailored permissions and obligations in specifically defined areas with built-in protections for individual rights and freedoms, and diplomatic rather than juridical mechanisms for suspension and termination.

Numerous principles and themes inform the substantive Titles of Part 3. These include the balance sought between the protection of collective security and individual freedoms; the respect embedded for national procedural autonomy and the domestic law of the UK, the EU and the Member States functioning as the reference point permitting executive action; asymmetries and non-reciprocity in the obligations between the two parties of the United Kingdom and the European Union and its Member States, the provision of future dynamic development of cooperation, and the use of legal 'meta-principles' to regulate cooperation in pursuit of the objectives of this Part of the TCA. Fine-grained analysis of Title II in the sub-section below reveals the manifestation of these principles in practice.

The analysis of each Title in the preceding sub-sections focuses on the macro-constitutional level of whether the Title replicates supranational constitutionalism through simulation of the AFSJ, or instead constructs a new form of intergovernmental cooperation. The reasons for divergences between the Titles are examined from the previous disrupted and disruptive engagement of the United Kingdom within the AFSJ before withdrawal on 31 January 2020.

### *2.1 Title II: Prüm cooperation*

Title II mandates co-operation on the exchanges of DNA, fingerprints and vehicle registration data. The 'PRUM' signifier in Articles LAW.PRUM.5-19 refers to the origins of cooperation in these

[9] 'Hohfeld's Legal Relations' <https://www.ics.uci.edu/~alspaugh/cls/shr/hohfeld.html> accessed 19 January 2021.
[10] 'Two Concepts of Liberty' <http://berlin.wolf.ox.ac.uk/published_works/tcl/> accessed 19 January 2021.
[11] See discussion in section 2.1 above.
[12] Most clearly Title III on Passenger Name Records; Title V on cooperation with Europol; and Title VI on cooperation with Eurojust.
[13] Most clearly Title II on exchanges of DNA, fingerprints and vehicle registration ('Prum' co-operation); Title VII on Surrender; Title X on Anti-money laundering and counter terrorist financing; Title XI on freezing and confiscation.

areas in the 'Prüm Convention' of 2005.[14] These norms were incorporated into the EU legal order by a Council Decision in 2008,[15] echoing the manner in which the Schengen Convention was incorporated following the Treaty of Amsterdam.[16] The political will for the United Kingdom to engage in cooperation on DNA, fingerprints and vehicle registration was foreshadowed by the decision of the David Cameron government to opt back into the 2008 Council Decision in January 2016 six months ahead of the Brexit referendum, after an initial decision to opt-out through Protocol (No 36) in 2014.[17] On this basis, Deirdre Curtin observed in 2017 that 'the UK government clearly wishes to stay connected in police and security cooperation' in relation to Prüm.[18] This history may explain why Title II more closely tacks towards UK cooperation in pre-existing EU mechanisms, rather than the creation *ex novo* of international law forms of cooperation. This is evidenced by the statement that the 'objective of this Title is to establish *reciprocal cooperation* between the competent law enforcement authorities'.[19]

Four brief observations may be made on the manifestation of the general themes of Part 3 within the Title on 'Prüm' cooperation. Within the 'definition' prescribed by Article LAW.PRUM.6, the declaration is made that 'agencies, bodies or other units dealing especially with *national security issues* are not competent law enforcement authorities for the purposes of this Title'.[20] This exception for the agents and guarantors of state sovereignty demonstrates how the United Kingdom's macro-political negotiating red-lines[21] have manifested themselves within the micro-legal granular operation of Part 3. A desire to ring-fence secret intelligence operations from the general intergovernmental structure of the TCA on the basis of their sensitivity for national security and sovereignty is further evidenced by the usage of a separate legal instrument concerning security procedures for exchanging and protecting classified information.[22]

Article LAW.PRUM.8 on automated searching of DNA profiles provides evidence of the built-in guarantees for the data protection rights of individuals in the wake of *Schrems*. 'Searches may be conducted only in individual cases and in compliance with the requesting state's domestic law'.[23] The general requirement of adherence to fundamental rights in principle and through international conventions is bolstered by such guarantees being weaved into the fabric of the legal operation of the clauses. The requirement for compliance with the requesting state's domestic law

[14] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration Prüm/Eifel, 27 May 2005.

[15] Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime OJ L 210, 6.8.2008, p. 12–72 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) Special edition in Croatian: Chapter 11 Volume 029 P. 214 - 274.

[16] See discussion in section 2.1

[17] Commission Decision (EU) 2016/809 of 20 May 2016 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in certain acts of the Union in the field of police cooperation adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen acquis C/2016/3032 OJ L 132, 21.5.2016, p. 105–106 (BG, ES, CS, DA, DE, ET, EL, EN, FR, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV).

[18] Curtin (n 2) 194.

[19] TRADE AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY, OF THE ONE PART, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, OF THE OTHER PART OJ L 444, 31.12.2020, p. 14–1462 art LAW.PRUM.5.

[20] ibid art LAW.PRUM.6.

[21] 'David Frost Lecture: Reflections on the Revolutions in Europe - No 10 Media Blog' <https://no10media.blog.gov.uk/2020/02/17/david-frost-lecture-reflections-on-the-revolutions-in-europe/> accessed 15 January 2021.

[22] AGREEMENT BETWEEN THE EUROPEAN UNION AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING SECURITY PROCEDURES FOR EXCHANGING AND PROTECTING CLASSIFIED INFORMATION.

[23] EU-UK TCA art LAW.PRUM.8.

also provides evidence that the national constitutional systems are the references point for the authorisation of action, rather than the supranational constitutional order.

The themes of mutual recognition and equivalence, which again were major sources of impasse during negotiations in relation to social and environmental standards,[24] may also be identified throughout Title II. Article LAW.PRUM.9 states that automated comparison of DNA profiles between the parties shall take place 'in accordance with *mutually accepted* practical arrangements'.[25] Article LAW.PRUM.15 requires the Parties to ensure that results of accredited forensic service providers operating in other states are as '*equally reliable*' as the results of domestic providers. Finally, Article LAW.PRUM.17 prescribes that states shall make all categories of data available to other states' authorities for searching 'under conditions *equal'* to those for domestic authorities. These examples continue the theme of cooperation being predicated upon bilateralism, and the requirement to mirror each other's standards, rather than compliance with a 'meta-standard' established at the supranational level. In this respect, Title II specifically and Part 3 generally may be regarded as examples of J.H.H. Weiler's concept of 'Constitutional Tolerance'.[26]

The provisions on *ex ante* evaluation in Article LAW.PRUM.18 and suspension and disapplication in Article LAW.PRUM.19 are microcosms of the provisions in Title XII governing review, termination, and suspension of the whole of Part 3 or selected Titles.[27] Paragraph 1 makes provision for an 'evaluation visit and a pilot run' in tandem with the prescription in paragraph 2 that the Union 'shall determine' the dates from which personal data may be supplied by Member States to the United Kingdom under Title II on the basis of the evaluation.[28] This schemata evokes the theme of the TCA as a starting-point for relations that could develop or diverge:[29] the evaluation visit and pilot run represent a further legal hurdle for the UK to clear regarding operability and compliance in practice, and the EU maintains control over the determination. This reinforces the observation that Title II more closely represents the EU granting access to pre-existing supranational cooperation, despite the provision throughout for bilateralism. Paragraph 3 mitigates the practical uncertainties of the future determination by enabling Member States to supply data in the interim, but for no longer than nine months after entry into force. The parallels to Article 50 TEU and the Withdrawal Agreement emerge again, with the reverse chronology of the transition period away from membership as this represents an implementation period towards the new relationship. The permission for the Specialised Committee to extend the interim period 'once by a maximum of nine months' evokes the option for extension of the Withdrawal Agreement transition period that was declined by the United Kingdom during negotiations.[30]

The Prüm specific suspension and disapplication mechanism differs from the general provisions in Title XII as it focuses on amendment.[31] Significantly, the condition for the Union to consider amendment necessary is defined as 'Union law relating to the subject matter governed by this Title is *amended substantially*, or is in the process [thereof]'.[32] This provision demonstrates that EU law remains the foundational source upon which cooperation on DNA, fingerprints and vehicle registration is based, and may be forwarded as evidence that Title II mandates a simulacrum of access to AFSJ cooperation rather than the construction of a new species of cooperation. The

[24] 'Statement by Michel Barnier Following Round 8' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1612> accessed 20 January 2021.
[25] EU-UK TCA art LAW.PRUM.9(1).
[26] 'Federalism and Constitutionalism: Europe's Sonderweg' <https://jeanmonnetprogram.org/archive/papers/00/001001-03.html> accessed 20 January 2021.
[27] See discussion in section 3.2 below.
[28] EU-UK TCA Article LAW,PRUM.18(1) and (2).
[29] See further discussion in section 3.2 below.
[30] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384/1 art 127.
[31] EU-UK TCA art LAW.PRUM.19.
[32] ibid art LAW,OTHER.PRUM.19(1).

process mandated under the Article ensures sensitivity towards the UK's red-line regarding 'dynamic alignment' with EU law.

Instead, a systematic 'static' process is defined whereby if the Parties do not reach agreement on amendment to track EU law within nine months, the Union may decide to suspend the Title or any *specific provisions* for up to nine months, with provision for a further extension of another nine months. The expiry of this period without agreement on amendment is the condition for the provisions to cease to apply, with the caveat that reinstatement will occur if the Union informs the UK it no longer seeks amendment.[33] This process may be interpreted through an intergovernmental lens as creating a 'veto' power over any dynamic alignment with the PNR *acquis* in the future, although in contradistinction to the general suspension mechanisms for fundamental rights and rule of law breaches,[34] the EU remains the only party empowered to notify suspension for the reason of non-amendment and non-alignment. The tailored mechanism whereby the EU may decide to suspend only certain relevant provisions of Title II ensures the minimal practical disruption through targeted disapplication, akin to the power to suspend only certain Titles under Title XII. Paragraph 3 supplements the process by echoing the general procedure in Title XII whereby the Specialised Committee is responsible for ensuring cooperation is concluded appropriately and personal data protection is maintained.[35]

### *2.2 Title III: Passenger Name Records*

Title III concerns the transfer and processing of passenger name record data. Again, the nomenclature of 'PNR' used for the legal provisions provides the evidence for what particular section of the AFSJ is being simulated. Passenger name record data has most recently been regulated by a Directive that came into force on 27 April 2016,[36] two months before the Brexit referendum. Even after official notification of the intention to withdraw on March 28 2017, the United Kingdom continued to implement the legal norms contained within the EU Directives within its domestic legal order.[37] Therefore, as with DNA, fingerprint, and vehicle registration cooperation under Title II, the UK legacy of opting-in since 2011[38] may explain the close simulation of the legal bases for supranational cooperation in this field.

### *2.3 Title IV: Cooperation on operational information – the limited SIS II replacement*

Title IV consists of only one provision concerning cooperation on operational information. In contrast to Title II and Title III, this Title lies at the other end of the spectrum between simulating AFSJ supranationalism and constructing new intergovernmental law enforcement cooperation. The objective is to enable mutual assistance between the Parties on relevant information pertaining to criminal offences; criminal penalties; threats to public safety; and money laundering and terrorism.[39] The Title operates as a residual supplement to the other substantive Titles, as evidenced by the clause 'to the extent that this [assistance on information] is *not provided for* in other Titles'.[40] The theme of domestic law as the reference point also re-emerges in the caveat that such action is

[33] ibid Article LAW.PRUM.19(2).
[34] See discussion in section 3.2 below.
[35] See discussion of the general mechanisms in section 3.2 below.
[36] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime OJ L 119, 4.5.2016, p. 132–149 (BG, ES, CS, DA, DE, ET, EL, EN, FR, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV).
[37] 'The Passenger Name Record Data and Miscellaneous Amendments Regulations 2018' <https://www.legislation.gov.uk/uksi/2018/598/made> accessed 19 January 2021.
[38] 'European Union Committee 11th Report of Session 2010–11 The United Kingdom Opt-in to the Passenger Name Record Directive Report HL Paper 113'.
[39] EU-UK TCA art LAW.OPCO.1(1)(a)-(d).
[40] ibid art LAW.OPCO.1.

'subject to the conditions of their [the Parties'] domestic law'.[41] This is reinforced in paragraph 4, which states that information may be requested and provided to extent that the conditions of the *domestic law* applying to the relevant authority 'do *not* stipulate that request…has to be made or channelled via *judicial authorities*'.[42] This demonstrates again the 'Constitutional Tolerance' of the UK and the EU, and the genuine administrative pluralism and respect for an analogue of the EU law concept of 'national procedural autonomy'[43] between the Parties. In particular, this may be regarded as a significant concession by the EU, as the concept of autonomy has led to a jealousy over ensuring the oversight of the Court of Justice of the EU in relation to judicial proceedings concerning EU action.

Gemma Davies observes that Title IV is evidence of the UK failure to maintain access to the Second Schengen Information System (SIS II), as Title IV 'does not provide real-time date and is therefore not a replacement for SIS II'.[44] This decision not to create a simulacrum of access for the UK to a pre-existing supranational mechanism explains the narrow nature of cooperation on operational information. The exclusion of the United Kingdom from SIS II may provide evidence that the EU's executive institutions have maintained their constitutional role in preserving the holistic integrity and telos of the AFSJ[45] during the negotiations of the EU-UK future relationship. Protocol (No 19) on UK opt-ins to Schengen during membership stipulated that the Council should enable participation to widest extent possible, with the caveat conditions of not 'seriously affecting the *practical operability*…of the Schengen *acquis* while respecting…*coherence*'.[46]

This latter principle is relevant to the conceptualisation of mechanisms such as SIS II as 'compensatory measures' that provide bolstered rights of securitisation for Member States in return for the power they sacrifice over internal border controls.[47] With regard to Part 3 of the Trade and Cooperation Agreement, and in contrast to the situation during UK disrupted and disruptive participation in AFSJ,[48] the EU has maintained this firewall – the United Kingdom has not been granted the rights of access to Schengen databases as it was not willing to adopt the duties of removing internal frontier controls that informs the telos of the Schengen *acquis*.[49]

### *2.4 Title V and Title VI: Cooperation with the supranational agencies Europol and Eurojust*

Title V concerns the EU agency Europol. This Title marks a return to mimicking United Kingdom cooperation as (disruptive) Member State within the AFSJ – the objective is defined as 'to establish cooperative relations between Europol and the competent authorities of the United Kingdom'.[50] The specific actions foreseen are 'to support and strengthen the action by the Member States and the United Kingdom…as well as their *mutual cooperation* in preventing and combating serious crime, terrorism, and…crimes which affect a common interest covered by a Union policy'.[51] Despite the object of the Title being a supranational institution, the objectives are clear that the action foreseen

[41] ibid.
[42] ibid art LAW.OPCO.1(4).
[43] Denis Baghrizabehi, 'THE CURRENT STATE OF NATIONAL PROCEDURAL AUTONOMY: A PRINCIPLE IN MOTION' (*undefined*, 2016) </paper/THE-CURRENT-STATE-OF-NATIONAL-PROCEDURAL-AUTONOMY%3A-Baghrizabehi/fb9fd2977e9e14aa6ad29ff74dda0877ede067d5> accessed 20 January 2021.
[44] 'Judicial Cooperation and Law Enforcement in the Brexit Deal' (*UK in a changing Europe*, 30 December 2020) <https://ukandeu.ac.uk/law-and-judicial-cooperation-in-the-brexit-deal/> accessed 20 January 2021.
[45] Garner (n 5).
[46] TEU and TFEU, Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union art 5(3).
[47] Peers (n 4); Steve Peers, *EU Justice and Home Affairs Law: EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (4th edn, Oxford University Press 2016).
[48] El-Enany (n 6).
[49] This can be contrasted to the security cooperation with EFTA states of Norway and Iceland, as these non-Member State *have* accepted the adoption of Schengen obligations. See Curtin (n 2).
[50] EU-UK TCA Article LAW.EUROPOL.47.
[51] ibid art LAW.EUROPOL.46.

is intergovernmental mutual cooperation to supplement each Parties' capabilities, rather than a replication of the pooling of such resources in the EU agency.

Title VI echoes the objectives of Title V in relation to the agency Eurojust and the relevant equivalent authorities within the United Kingdom.[52] The intertwinement of the two Titles is evidenced by the fact that the 'EUROJUST' provisions continue the sequence of numbering of the 'EUROPOL' provisions in Title V. The two agencies, and thus the two titles, may be regarded as a manifestation of the doctrine of 'separation of powers'[53] at the level of intergovernmental cooperation beyond the state. The definitions contained within Article LAW.EUROJUST.62 identify personnel within the branch of the constituted power of the judiciary – such as Liaison Prosecutors and Liaison Magistrates[54] – in contrast to the personnel defined in Title V as members of the constituted power of the executive branch.

The willingness of the United Kingdom to mandate Europol and Eurojust cooperation provides further evidence for its engagement with the 'security' limb of the AFSJ at the expense of the 'freedom' telos – albeit the Eurojust cooperation may show continuing fealty to the 'justice' aspiration of the AFSJ, but with an explicit limitation to criminal rather than civil judicial proceedings. It should be noted, therefore, that Title VI simulates Chapter 4 of Title V TFEU on judicial cooperation in *criminal* matters, and omits Chapter 3 on judicial cooperation in *civil* matters.[55] This may represent the limits of what the United Kingdom government perceives as justifiable subject-matters to direct its newly repatriated sovereignty towards – whereas criminal cooperation beyond the state is justified on the basis of the existential threat this poses to the security of the polity, civil judicial matters may be regarded as beyond the Rubicon to the paradigm of supranational constitutionalism and the regulation of the private lives of individuals as supranational citizens across borders.

Article LAW.EUROPOL.47 identifies the specific EU law source of the "Europol Regulation".[56] Article LAW.EUROJUST.62 identifies the corresponding "Eurojust Regulation".[57] As with the new EU legislation on Prüm and PNR discussed in the above section, the Europol Regulation was adopted around the time of the UK referendum on 11 May 2016. The Eurojust regulation was adopted later, during the negotiations of the Withdrawal Agreement, on 14 November 2018. This legislation formed part of the package of measures replacing the old Third Pillar intergovernmental 'Council Decisions' with the post-Lisbon supranational categories of Directives and Regulations.[58] Again, a previous United Kingdom government foreshadowed the current executive's negotiating preferences that have led to Title V cooperation on Europol through its decision in November 2016 to exercise the discretion to opt-in to the Europol Regulation under Protocol (No 21).[59] Towards the end of the Theresa May premiership, the government accordingly

[52] ibid Article LAW.EUROJUST.62-76.

[53] 'Montesquieu and the Separation of Powers | Online Library of Liberty' <https://oll.libertyfund.org/pages/montesquieu-and-the-separation-of-powers> accessed 20 January 2021.

[54] Loïc Azoulai, 'The (Mis)Construction of the European Individual: Two Essays on Union Citizenship Law' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2515889 <http://papers.ssrn.com/abstract=2515889> accessed 30 January 2016.

[55] The only reference to civil courts is made in Article LAW.CONFISC.10(6).

[56] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA OJ L 135, 24.5.2016, p. 53–114 ( 794.

[57] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA PE/37/2018/REV/1 OJ L 295, 21.11.2018,.

[58] Peers (n 48); Peers (n 4).

[59] Home Office, 'Explanatory Memorandum on the UK Government's Intention to Opt in to Regulation (EU) 2016/794 of the European Parliament and of the Council on 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936?JHA and 2009/968/JHA.' (2016) <http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/11/EM_Europol_Opt_in.pdf>; see also Curtin (n 2) 187–8.

decided to opt in also to the new Eurojust regulation in January 2019.[60] Deirdre Curtin envisaged the current arrangements established under Title V in 2017, observing that whereas '[t]here are…no non-Schengen states outside the EU with which the EU engages in anything comparable to its cooperation with Member States or Schengen States… [t]here has of course never been an existing member State that has exited before, so a further bespoke arrangement in specific regards cannot be ruled out'.[61]

The tailored intergovernmental arrangements for the United Kingdom in Title V and Title VI may provide evidence for the claim that the EU has engaged in a functional categorisation on the basis of the legal sources within TFEU Title V to determine what sectors of the AFSJ the UK may participate in. As Europol and Eurojust fall within Chapter 4 on judicial cooperation in criminal matters rather than Chapter 2 on border checks, asylum and immigration, the EU seems content to allow participation despite non-retention of the Schengen *acquis*. However, this cooperation is safeguarded by the themes that have been identified as running throughout Part 3, including in-built protections for individual rights and especially data protection, the bilateralism of the reference point of each parties' domestic law, and mutual recognition and equivalence.[62]

### *2.5 Title VII: 'Surrender' – replacing the European Arrest Warrant*

Title VII concerns surrender, with the objective of establishing an 'extradition system' and a 'mechanism of surrender' between the Member States and the United Kingdom. It is revealing that, in contrast to Title II, Title V and Title VI using the explicit terminology of the supranational constitutional order, Title VII uses the neutral term of 'surrender' and 'SURR' in its wording, rather than making any reference to the European Arrest Warrant. The legislation establishing the EAW was one of the AFSJ measures that the United Kingdom did decide to opt back into following the wholesale opt-out in 2014 under Protocol (No 36).[63] Deirdre Curtinmay have identified the factor that has required a distinction in nomenclature and thus substance between Title VII and the European Arrest Warrant: 'it is uncertain whether an agreement between the UK and the EU on future cooperation in terms of the EAW would include a condition subjecting the UK to the CJEU'.[64] The absence of any such jurisdiction – as a means to realise the United Kingdom's negotiating red-lines – may be why a new intergovernmental arrangement has been constructed.

Gemma Davies succinctly summarises the differences between the EAW and Title VII on surrender: the political offences exception, the nationality exception, and the dual criminality exception.[65] These provisions can therefore be regarded as the predicative dividing line between supranationalism and intergovernmentalism. It is therefore significant that notifications made in relation thereto can be amended in the future.[66] Davies corroborates the confirmation of Deirdre Curtin's speculation that the UK-EU measures might mirror the surrender agreements with Norway and Iceland – she identified these mechanisms as 'a possible precedent' on the basis of their dispute resolution mechanisms being based on a 'meeting of representatives of the government'.[67] John Bell echoes Curtin's further observation that Iceland and Norway must consider 'the development of the

[60] 'UK Participation In The EU Agency For Criminal Justice Cooperation (Eurojust): Post-Adoption Opt-In Decision - Wednesday 16 January 2019 - Hansard - UK Parliament' <https://hansard.parliament.uk/commons/2019-01-16/debates/348E5455-43D8-4161-94A9-3626ECADD3E5/UKParticipationInTheEUAgencyForCriminalJusticeCooperation(Eurojust)Post-AdoptionOpt-InDecision> accessed 20 January 2021.

[61] Curtin (n 2) 189.

[62] For final version, pinpoint the specific examples.

[63] Curtin (n 2) 196.

[64] Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 Common Market Law Review 17, 187.

[65] 'Judicial Cooperation and Law Enforcement in the Brexit Deal' (n 45).

[66] See discussion of Title XII - 'other provisions' in section below.

[67] Curtin (n 2) 197.

case law of the Court of Justice' on the basis of Article 37 of their agreements.[68] Bell argues that 'in the TCA, the closest equivalent to Article 37 is the [Partnership Council's] role in the event of termination or suspension of Part 3 of the TCA'.[69] The broader constitutional architecture of the EEA Agreement as the basis for the two EFTA states' relations with the EU may explain this divergence. Whereas that Agreement is subject to principles of 'dynamism' and 'homogeneity' in tracking CJEU case law,[70] and covers such core constitutional areas as free movement law, the UK-EU TCA completely omits any role for the Luxembourg court or its case-law.[71]

This jurisdiction issue is predicative for Title VII as surrender is intimately intertwined with the issue of the juridical application of norms to individuals. The 'definitions' clause makes it clear that '"arrest warrant" means a *judicial decision* issued by a state with a view to the arrest and surrender by another State of a requested person', and the following sub-clause goes on to define a "judicial authority".[72] The juridical focus on Title VII may also explain why the 'principle of proportionality' is explicitly defined and elaborated in the first substantive provision of the Title.[73] This functions as another example of the inherent safeguards created to restrain executive action – 'cooperation…shall be *necessary* and *proportionate*', and also provides further evidence of the in-built protection of individual rights, with the prescription to take into account the '*rights* of the requested persons and *interests* of the victims', and the possibility of 'measures less coercive that surrender' to avoid 'unnecessarily long periods of pre-trial detention'.[74]

The formulation of the 'rights of the requested person' is repeated in the nomenclature for Article LAW.SURR.89, which thus functions as a microcosmic in-built 'Bill of Rights' simulacrum for the Title, for example defining the right to be assisted by a lawyer and the right to consular information.[75] These may be regarded as significant as they seem to mandate the *creation* of rights through the TCA, rather than simply *recognising* pre-existing rights, such as indicated in other parts of Part 3 by the formulation 'in accordance with domestic law'. Further examples of these phenomena of safeguards and in-built rights protection can be found in the rigorously detailed schemata for the Parties to follow for the grounds for 'non-execution of the arrest warrant'.[76] The Parties have dedicated themselves to providing safeguards for individual liberty that are built into the provisions allowing the pooling anew of sovereign executive power that transcends the newly reinstated sovereign borders in the pursuit of collective security.

Despite Title VII being an example of the 'new old intergovernmentalism', Article LAW.SURR.87 makes provision for the continuation of direct judicial relations between UK and Member State authorities: 'If the location of the requested person is known, the issuing judicial authority may transmit the arrest warrant *directly* to the executing judicial authority'.[77] This is significant, as it maintains direct bilateral judicial cooperation despite these courts no longer existing within the same supranational legal order, and without both the issuing and transmitting states being subject to the EU law principle of 'mutual trust'.[78] This means a form of judicial dialogue will continue bypassing the need for the executive constituted powers to act as an intermediary as the representative of the sovereign state in international relations. The same theme

[68] 'New Year, New Relationship—Bespoke Governance and Tenuous ECHR Conditionality in Part 3 of the EU-UK TCA – European Law Blog' <https://europeanlawblog.eu/2021/01/12/new-year-new-relationship-bespoke-governance-and-tenuous-echr-conditionality-in-part-3-of-the-eu-uk-tca/> accessed 22 January 2021.
[69] ibid.
[70] Philipp Speitler, 'Judicial Homogeneity as a Fundamental Principle of the EEA' [2017] The Fundamental Principles of EEA Law 19.
[71] EU-UK TCA art COMPROV.13.
[72] ibid Article LAW.SURR.78(a) and (b).
[73] ibid Article LAW.SURR.87.
[74] ibid art LAW.SURR.77.
[75] ibid art LAW.SURR.89(3) and (5).
[76] ibid art LAW.SURR.81.
[77] ibid art LAW.SURR.87.
[78] Francesco Maiani and Sara Migliorini, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice' (2020) 57 Common Market Law Review 7.

is evident in the following provision, which mandates 'all difficulties concerning the transmission or the authenticity of any document' to be dealt with by 'direct contacts between the judicial authorities involved' and only 'where appropriate…the involvement of the central authorities of the States'.[79] Here the direct relations may be regarded as a form of delegation to the bodies that have the requisite joint expertise to resolve the coordination problem at issue.

Some final points of interest in relation to Title VII concern the interaction with both EU law and other mechanisms of international law cooperation on surrender. Article LAW.SURR.94 prescribes that if two or more states issue a European arrest warrant, one of the circumstances the executing judicial authority should take into account is the 'legal obligations of Member States deriving from Union law regarding, in particular, the principle of freedom of movement and non-discrimination on grounds of nationality'.[80] This may function as an exception – albeit limited – to the general situation whereby concepts of EU law do not apply by virtue of the TCA.[81] This provision suggests that, to the contrary, UK courts would have to take into account EU law if it were faced with this situation. It is particularly significant that UK judicial authorities would be required to take into account freedom of movement, as the concept has not been retained in the new EU-UK future relationship.

Finally, Article LAW.SURR.109 on 'relation to other legal instruments' establishes an analogue to the primacy of EU law. The provisions identifies that certain provisions of the European Conventions on Extradition and Suppression of Terrorism will be replaced by corresponding provisions in Title III. This establishes the new provisions on surrender as the apex of the normative hierarchy[82] of European intergovernmental measures in relation to arrest warrants.

### *2.6 Title VIII: Mutual assistance*

Title VIII establishes a system of mutual assistance between relevant EU and UK authorities. If Titles V and VI on cooperation with Europol and Eurojust may be regarded as one end of the continuum of replicating supranational constitutional cooperation, Title VIII may be regarded as lying at the other pole of new old intergovernmentalism. The objective is explicitly defined as 'supplementation' and 'facilitation' of specifically identified pre-existing international law mechanisms.[83]

The theme of Part Three TCA as a dynamic instrument continues through the obligation for the Specialised Committee to 'undertake to establish a standard form' through an annex to the Agreement.[84] One may draw a comparison to the 'skeleton bills'[85] issued by the United Kingdom to re-shape the post-Brexit domestic legal system that have been the subject of virulent criticism[86] – the same phenomenon emerges of future implementation by executive bodies. A similar power of amendment exists in relation to the Specialised Committee power to decide that time limits for certain offences will no longer apply.[87]

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[79] EU-UK TCA art LAW.SURR.88(4).

[80] ibid art LAW.SURR.94.

[81] ibid Part One, Title II: Principles of interpretation and definitions.

[82] 'On the Role of Normative Hierarchies in Constitutional Reasoning: A Survey of Some Paradigmatic Cases - Scarcello - 2018 - Ratio Juris - Wiley Online Library' <https://onlinelibrary.wiley.com/doi/abs/10.1111/raju.12220> accessed 22 January 2021.

[83] European Convention on Mutual Assistance in Criminal Matters, 20 April 1959; Additional Protocol to the European Mutual Assistance Convention, 17 March 1978; and the Second Additional Protocol to the European Mutual Assistance Convention, 8 November 2001.

[84] EU-UK TCA art LAW.MUTAS.115.

[85] European Union (Withdrawal) Act 2018; European Union (Withdrawal Agreement) Act 2020; European Union (Future Relationship) Act 2020.

[86] 'Looking Back at the EU Future Relationship Act' (*UCL Europe Blog*, 11 January 2021) <https://ucleuropeblog.com/2021/01/11/looking-back-at-the-eu-future-relationship-act/> accessed 2 February 2021.

[87] EU-UK TCA art LAW.MUTAS.120(7).

Another running theme of safeguards for individual liberty is evidenced through the emphasis on 'less intrusive means' in investigative measures,[88] and the implementation of the meta-principle of *ne bis in idem*.[89] The provision on time-limits raises an interesting question over the extent to which cooperation is permissive rather than obligatory – the requested state 'shall decide…no later than 45 days'[90] whether to execute the request, suggesting that it retains a permission whether to cooperate with the prescription only relating to the procedure.

Article LAW.MUTAS.121 on transmission of requests may suggest an asymmetry in the obligations between the Parties – whereas United Kingdom public prosecutors may transmit requests directly if conditions are met,[91] no such power is explicitly assigned to the equivalent Member State authorities. Finally, the theme of the relationship with EU law that arises in relation to surrender is also relevant to mutual assistance – the relationship *between Member States* within Joint Investigation Teams 'shall be governed by Union law, notwithstanding the legal basis…in the Agreement'.[92] This provision functions as a safeguard for the autonomy of EU law, and means that the jurisdiction thereof will remain attached to the function of Member State authorities even when acting on the basis of the external source of legal authority of the TCA Part 3.

### *2.7 Title IX: Criminal record information – replacing ECRIS*

Title IX enables exchange of criminal record information. This covers cooperation that was previously mandated by the UK's access to the European Criminal Records Information System (ECRIS).[93] As with cooperation on operational systems through SIS-II, cooperation on criminal records was an area that the UK government sought to pursue even after notification of withdrawal was pursued. The then-Home Secretary stated in Parliament on 2 November 2017 that the UK had sought to opt in to a new Regulation on ECRIS in relation to Third-Country Nationals[94] because 'it supports effective criminal justice decisions which ensure that relevant public protection measures are considered'.[95] Despite this UK policy, and unlike with Europol and Eurojust, Title IX does not provide access to supranational mechanisms.

Gemma Davies observes that '[a]lthough the UK will lose access to…ECRIS, the agreement does provide for enhancement of the European Convention on Mutual Assistance in Criminal Matters'.[96] This seems to echo the supplement to international law tenor of Title VIII. This is confirmed by Article LAW.EXINF.120(2)(a) in which the language of 'supplementation' is used. The following sub-paragraph also confirms again the hierarchical priority of Part 3 TCA amongst international law instruments, by stating that a specific article of the European Convention on Mutual Assistance is 'replaced' by the provisions of the Title.[97] A subtler form of disapplication rather than repeal is evidence in the obligation for the Parties to 'waive the right to rely

[88] ibid art LAW.MUTAS.117(3).
[89] ibid art 117.
[90] ibid art LAW.MUTAS.120.
[91] ibid art LAW.MUTAS.121.
[92] ibid art LAW.MUTAS.122.
[93] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA OJ L 93, 7.4.2009, p. 33–48.
[94] Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 PE/88/2018/REV/1 OJ L 135, 22.5.2019, p. 1–26 816.
[95] 'European Union Opt-In Decision: European Criminal Records Information System for Third Country Nationals (ECRIS-TCN) and the EU's Justice and Home Affairs IT Agency (Eu-LISA): 2 Nov 2017: Hansard Written Answers' (*TheyWorkForYou*) <https://www.theyworkforyou.com/wms/?id=2017-11-02.HCWS219.h> accessed 22 January 2021.
[96] 'Judicial Cooperation and Law Enforcement in the Brexit Deal' (n 45).
[97] EU-UK TCA art LAW.EXINF.120(2)(a) and (b).

on…reservations to Article 13'[98] of the Convention. The exclusion of a paradigmatic tool of state sovereignty in international relations – unilateral reservations – suggests that in legal form there will still be some residual elements of supranational constitutionalism rather than pure international law intergovernmentalism in the legal framework for the exchange of criminal record information. Finally, the extensive conditions for the use of personal data prescribed by Article LAW.EXINF.128 provide further evidence for personal data protection being the core constitutional right upheld in Part 3 of the TCA. Article LAW.EXINF.128 starkly demonstrates the interplay between individual freedom and collective security. Paragraph 3 prescribes an exception to protection, and the permission for any personal data to be used in order to 'prevent an immediate and serious threat to public security'.[99]

### *2.8 Title X and Title XI: Anti-money laundering and counter-terrorist financing and freezing and confiscation of property*

Both of the final substantive Titles of Part 3 address the subject-matter of targeting the means of funding and proceeds of transitional criminal activities. The intersection with private property and the tension with collective security make these Titles particularly relevant to the theme of in-built safeguards for individual rights. Title X covers anti-money laundering and counter terrorist financing. The theme re-emerges of supplementation of pre-existing unilateral action, rather than mandating UK access to EU mechanisms, through the definition of the objective to '*support* and *strengthen* action by the Union and the United Kingdom'.[100] Title XI enables the freezing and confiscation of property in relation to criminal matters. The objective of the Title is more ambitious than Title X, as it seeks to 'provide for cooperation…to the *widest extent possible*'.[101] Further examples of the running themes of Part 3 may be identified throughout the Titles: the balance between individual liberty and collective security,[102] the re-emergence of the 'public security' exception in relation to confiscation of property,[103] the prevalence of the meta-principles of administrative law of 'necessity' and 'proportionality',[104] the replacement of pre-existing international law cooperation,[105] the respect for domestic constitutional legal frameworks as the reference point of authorisation,[106] and provisions enabling dynamic future development.[107] Title XI also contains another example of permission for direct judiciary to judiciary communications in cases of 'urgency' in the confiscation of property, but with a more direct connection to the executive through an obligation of accountability to the political institutions.[108] From the perspective of EU law, the permission for the EU to nominate a Union body in Article LAW.CONFISC.21 that 'may execute requests under this Title', with the caveat that such requests are 'to be treated…as a request by a Member State', in addition to the permission to designate a Union body as the 'central authority'[109] may incubate tension between the national and the supranational and the potential for claims that operational autonomy of the Member States in their relations with the United Kingdom has been displaced.

[98] ibid art LAW.EXINF.120(3).
[99] ibid art LAW.EXINF.128(3).
[100] ibid art LAW.AML.127(1).
[101] ibid art LAW.CONFISC.1.
[102] ibid art LAW.AML.129(5), art LAW.CONFISC.15.
[103] ibid art LAW.CONFISC.30.
[104] ibid art LAW.CONFISC.1.5.
[105] ibid art LAW.CONFISC.1(6).
[106] ibid art LAW.CONFISC.1(3), art LAW.CONFISC.15(3), LAW.CONFISC.20,.
[107] ibid art LAW.AML.130(4), art LAW.CONFISC.4, LAW.CONFISC.5, LAW.CONFISC.23(6), LAW.CONFISC.4, LAW.CONFISC.5, LAW.CONFISC.22(5).
[108] ibid art LAW.CONFISC.22.
[109] ibid art LAW.CONFISC.21(2).

## 3. The Structure: Title I, Title XII, and Title XIII – the 'new old' intergovernmentalism

Title I on 'General provisions', Title XII on 'Other provisions', and Title XIII on 'dispute resolution' provide the new structural framing between the EU and the UK in security co-operation. This structure represents a transformation towards 'new old intergovernmentalism' through the similarities to the former Third Pillar on Justice and Home Affairs. The 'old' features of specifically defined areas of competence and a diplomatic paradigm for governance and disputes is complemented by the 'new' phenomenon of a foundation stone of individual rights protection, and particularly respect for personal data protection – the 21st century *Zeitgeist* of supranational constitutionalism.

### *3.1 'General provisions' – Specific objectives and a rights-based foundation stone*

Title I may be regarded as the successor provision for the EU and UK to the TEU and TFEU articles that establish the telos and values informing executive actions on security within the paradigm of supranational constitutionalism.[110] The objective of this Part of the Agreement is defined specifically as 'the prevention, investigation, detection and prosecution of *criminal offences* and the prevention of and fight against *money laundering* and *financing of terrorism'* (emphasis added).[111] The limitation of co-operation to discrete actions and subject-matters stands in contrast to the holistic aspirations entrenched in Title V TFEU: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'.[112]

In place of the United Kingdom being embedded in a constitutional space in which the objectives of individual freedom and justice and collective security are mutually co-constitutive,[113] Article LAW.GEN.3 establishes that the Parties' pre-existing commitments to the constitutional values of democracy, the rule of law, and the protection of fundamental rights and freedoms function as a foundation stone.[114] The bookend provisions in Title XII and Title XIII on termination and suspension make it clear that deviation from these commitments would function as a guillotine terminating the cooperation.[115] The Universal Declaration of Human Rights and the European Convention on Human Rights are identified explicitly as residual international law sources that provide a shared basis for the Parties in light of the United Kingdom's non-retention of the Charter of Fundamental Rights of the European Union in its domestic law.[116] The reference to the 'importance of giving effect to the [ECHR] rights and freedoms…domestically' reflects the unease around the repeated flirtations of United Kingdom governments since 2010 with repeal or reform of the Human Rights Act 1998.[117]

The general shared commitments to human rights and fundamental freedoms are supplemented by the specific declaration in Article LAW.GEN.4 that the cooperation in Part 3 is 'based upon the Parties' long-standing commitment to ensuring a high level of protection of

[110] See *inter alia* Consolidated Version of the Treaty on European Union [2008] OJ C115/13 art 2; TFEU art 67; 'Charter of Fundamental Rights of the European Union' 17.

[111] EU-UK TCA Article LAW.GEN.1.

[112] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326, Art 67.

[113] Massimo Fichera, *The Foundations of the EU as a Polity* (Edward Elgar Publishing 2018); Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004); Maria Fletcher, Ester Herlin-Karnell and Claudio Matera, *The European Union as an Area of Freedom, Security and Justice* (1 edizione, Routledge 2016).

[114] EU-UK TCA art LAW.GEN.3.

[115] ibid art LAW.OTHER.136 and art LAW.OTHER.137.

[116] European Union (Withdrawal) Act 2018.

[117] 'Long Read | Will the UK Uphold Its Commitment to Human Rights?' (*LSE BREXIT*, 30 June 2020) <https://blogs.lse.ac.uk/brexit/2020/06/30/long-read-will-the-uk-uphold-its-commitment-to-human-rights/> accessed 15 January 2021.

personal data'.[118] This reflects the *Zeitgeist* in the 2010s whereby technological advances led to personal data protection becoming the most visible battleground between the exercise of power by public authorities and the constitutional rights of individuals.[119] The special provision made for data protection rights also reveals early in Part 3 that its predominant feature is the exchange of information between security authorities, and the attendant risks for the privacy of individuals. Indeed, the specific factual scenario of the *Schrems* cases – mass transfer of personal data to security authorities in the United State of America[120] – casts its shadow over the new cooperation: 'onward transfers to a third country are allowed only subject to conditions and safeguards appropriate to the transfer ensuring that the level of protection is not undermined'.[121]

The rest of Article LAW.GEN.4(9)(f) establishes numerous prescriptions that provide a clear administrative schemata to safeguard the pre-existing high level of data protection in the new cooperation between the EU and the UK outside of formal membership. These prescriptions include principles and measures for the processing of various categories of data,[122] the granting of specific rights of access, rectification and erasure for data subjects,[123] and enforceable rights of administrative and judicial redress,[124] obligations for authorities to notify risks of breach,[125] and provision for supervision by independent authorities.[126] This general structural provision provides the first indication of several of the key legal themes that run throughout Part 3.

The most important is the substitution of the holistic guarantees of the rights of individuals found in the Treaties and the Charter of Fundamental Rights with a tailored form of protection whereby guarantees of individual rights are built into the provisions mandating EU-UK cooperation. A second theme is the utilisation of legal 'meta-principles' guiding action that transcend specific positive law sources in either the EU, Member States or United Kingdom legal orders. This is evidenced by the reference to the data subjects' rights being 'subject to possible restrictions provided for by law which constitute *necessary* and *proportionate* measures in a democratic society to protect important objectives of public interest'.[127] The familial resemblance to the general formulation for exceptions to ECHR rights[128] shows that the general commitment to the objectives of international human rights treaties also manifests itself in the minutiae of the text of the legal provisions. However, the reference in the text to the possible restrictions being 'provided for *by law*' demonstrates another important theme running throughout the cooperation: the domestic legal frameworks provide the reference point for authorisation, rather than the overarching supranational structure of EU law. This functions as the fine-grained instrumentalisation of the UK government's negotiating red-line of preserving the sovereignty that it perceived as having been returned by withdrawal.[129]

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[118] EU-UK TCA art LAW.GEN.4.

[119] *Case C-362/14, REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 17 July 2014, received at the Court on 25 July 2014, in the proceedings Maximillian Schrems v Data Protection Commissioner, joined party: Digital Rights Ireland Ltd* ECLI:EU:C:2015:650; *Case C-311/18, REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 4 May 2018, received at the Court on 9 May 2018, in the proceedings Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems, intervening parties: The United States of America, Electronic Privacy Information Centre, BSA Business Software Alliance Inc, Digitaleurope* ECLI:EU:C:2020:559.

[120] 'Schrems II and Surveillance: Third Countries' National Security Powers in the Purview of EU Law' (*European Law Blog*, 24 July 2020) <https://europeanlawblog.eu/2020/07/24/schrems-ii-and-surveillance-third-countries-national-security-powers-in-the-purview-of-eu-law/> accessed 15 January 2021.

[121] EU-UK TCA art LAW.GEN.4(9)(F).

[122] ibid art LAW.GEN.4(9)(a), (b), and (c).

[123] ibid art LAW.GEN.4(9)d).

[124] ibid art LAW.GEN.4(9)(h).

[125] ibid art LAW.GEN.4(9)(e).

[126] ibid art LAW.GEN.4(9)(g).

[127] ibid art LAW.GEN.4(9)(d).

[128] 'European Convention on Human Rights - Official Texts, Convention and Protocols' <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> accessed 15 January 2021.

[129] 'David Frost Lecture: Reflections on the Revolutions in Europe - No 10 Media Blog' (n 22).

### *3.2 'Other provisions' – a dynamic instrument?*

One of the themes of Part 3 of the Trade and Cooperation Agreement is its status as a starting-point for future relations to be developed, rather than a final statement of the new EU-UK partnership.[130] Title XII on other provisions provides the most imminent example of this phenomenon. Article LAW.OTHER.134 obliges the UK and the EU to make decisions on exercising their discretions under Title VII on surrender.[131] The notifications pertain to exceptions from the new surrender mechanism for political offences[132] and nationality,[133] and with regard to permitting revocations for consent to surrender.[134] The Parties are instructed to make such notifications 'by the date of entry into force' and the latest date to must make such notifications is defined as 'two months after the entry into force' of the TCA.[135] The Parties are also actively obliged to indicate if they will make no such notification rather than passively omitting to do so, ensuring clarity over the legal situation.

The pressing significance of these three areas is demonstrated by the fact that Article LAW.OTHER.134(2) prescribes that notifications under numerous other Articles of Part 3 can be 'made at any time'.[136] Furthermore, notifications made in relation to recourse to central authority in surrender matters, content and form of arrest warrants, and form of request and languages may be *modified* at any time under paragraph 3 of the Article.[137] Under paragraph 4, any notifications made in relation to the political offence exception, the nationality exception, and recourse to the central authority in surrender matters, consent to surrender, requests for information on bank accounts and safe deposit boxes, requests for information on banking transactions, and requests for the monitoring of banking transactions may be *withdrawn* at any time.[138] These possibilities indicate that the legal matrix of duties, permissions, and exceptions may be in flux throughout the lifetime of Part 3 of the TCA, leading to a fluid and dynamic legal instrument that may ebb and flow over time in relation to the powers of security authorities and the rights of individuals.

If Part 3 does develop dynamically, it is crucial that such changes are transparent and accessible to ensure that individuals as objects of the law are aware of the contemporary legal situation.[139] Paragraph 5 addresses this partially, by imposing an obligation for the Union to publish information on notifications of the United Kingdom in the Official Journal. However, the scope is limited narrowly to notifications made under Article LAW.SURR.85(1) on recourse to the central authority in matters of surrender. This implies that there is no obligation to publish information on the issue, modification, or withdrawal of any of the other notifications categorised within Article LAW.OTHER.134. As these notifications include possible exceptions to extradition for nationals and for political offences, this could lead to the precise legal situation being unclear for relevant individuals. Opacity in the amendment and development of the new EU-UK legal relationship is a

[130] See further in section x.x.
[131] See section 3.2 below.
[132] EU-UK TCA Article LAW.SURR.82.
[133] ibid Article LAW.SURR.83(2).
[134] ibid Article LAW.SURR.91(4).
[135] ibid Article LAW.OTHER.134.
[136] In relation to the scope of the surrender title (Article LAW.SURR.79(4); recourse to the central authority in surrender matters (Article LAW.SURR.85(1)); the content and form of arrest warrants (Article LAW.SURR.86(2)); possible prosecution for other offences (Article LAW.SURR.105(1)); surrender or subsequent extradition (Article LAW.SURR.106(1)); requests for information on bank accounts and safe deposit boxes (Article LAW.CONFISC.4(4)); requests for information on banking transactions (Article LAW.CONFISC.5(5)); requests for monitoring banking transactions (Article LAW.CONFISC.6(5)); ground for refusal (Article LAW.CONFISC.15(2)) and the form of request and languages (Article LAW.CONFISC.23(3) and (7)).
[137] EU-UK TCA Article LAW.OTHER.134(3).
[138] ibid Article LAW.OTHER.134(4).
[139] 'PDF - The Rule of Law Checklist' (*Council of Europe Bookshop*) <https://book.coe.int/en/constitutional-law/7019-pdf-the-rule-of-law-checklist.html> accessed 19 January 2021.

continuation of a similar theme in relation to decisions of the EU-UK Joint Committee established under the Withdrawal Agreement.[140]

The impending deadlines for notification are supplemented by obligationsfor the EU and the UK to notify to each other the identity of the numerous competent authorities in the areas of cooperation mandated under Part 3 'by the date of entry into force'.[141] Paragraphs 6 and 7 provides a useful schemata of the institutional scaffolding that runs throughout the substantive Titles of Part 3, and the subtle distinctions between the relevant UK and EU/Member State institutions. For example, the UK is obliged to notify the 'competent law enforcement authority for the purposes of Title V [cooperation with Europol] and a short description of its competences', whereas no such obligation falls upon the EU and Member States side, as these institutional matters are already established in EU law.[142]

A further asymmetry between the Parties is mandated by Article LAW.OTHER.134(9). Whereas the EU is permitted to notify more than one authority for every category, the United Kingdom is not permitted to notify more than one authority to act as the Europol national contact point nor as the Domestic Correspondent for Terrorism Matters.[143] These institutional asymmetries manifest themselves by virtue of certain Titles – including cooperation with Europol – being concerned with establishing the conditions of access for UK authorities to pre-existing EU mechanisms and bodies established under the AFSJ, rather than establishing international law cooperation *ex novo*.[144]

The permission in paragraph 8 for the notifications of relevant authorities to be 'modified at any time' means that the institutional dynamics of Part 3's administration may also be subject to fluctuation such is the case with the legal obligations and notifications as discussed above. The special provision for notifications by the Union established by paragraph 10 may provide foreshadowing of competence tensions and clashes between the EU and its Member States in the future. The Union is obliged, when making notifications, to indicate which Member States the notification applies to, or whether it is making the notification on its own behalf. The Janus face required of the competent EU authorities may expose tensions over whether the national or supranational level should be responsible in a matter as sensitive to sovereignty as internal security and 'core state powers'.[145] Paragraph 10 may even be regarded as microcosmic of the tensions that may arise over the EU's assignation of the Trade and Cooperation Agreement as an exclusive EU external agreement, rather than a mixed agreement.

### *3.3 Review and evaluation – opaque collective self-regulation?*

The definition of objectives and safeguards for individual rights in Title I are given teeth by the provisions on review and evaluation,[146] termination,[147] and suspension[148] in Title XII. Article LAW.OTHER.135 sets the standard whereby evaluation of Part 3 of the TCA and any subsequent actions taken occur in the realm of diplomacy and politics rather than adjudication and law. The

[140] 'Written Evidence Submitted to the House of Commons Committee on the Future Relationship with the European Union: The EU-UK Joint Committee' <https://binghamcentre.biicl.org/publications/written-evidence-submitted-to-the-house-of-commons-committee-on-the-future-relationship-with-the-european-union-the-eu-uk-joint-committee> accessed 19 January 2021.

[141] EU-UK TCA Art LAW.OTHER.134(6) and (7).

[142]

[143] 'The United Kingdom and the Union may notify more than one authority *with respect to points (a), (b), (d), (e), (g), (h), (i) and (j) of paragraph 6*, and *with respect to paragraph 7* respectively' (emphasis added). EU-UK TCA art LAW.OTHER.134(9).

[144] See section 3.1 above.

[145] Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press 2013).

[146] EU-UK TCA art LAW.OTHER.135.

[147] ibid art LAW.OTHER.136.

[148] ibid art LAW.OTHER.137.

scope of the reviews are defined as pertaining particularly to 'implementation, interpretation, and development' of Part 3. In addition to reviews in accordance with the general mechanism for the TCA,[149] either Party may request review at any point with the condition for commencement being joint agreement.

The Parties retain discretion over how the review shall be conducted, with the only procedural obligation being the requirement to decide this in advance.[150] The only obligation regarding the composition of the review teams are that they 'include persons with appropriate expertise with respect to the issues under review'.[151] As opposed to transparent procedures to ensure accountability, the participants are obliged to respect confidentiality, with the caveat that this is 'subject to applicable law'.[152] The overall tenor is that review and evaluation will be subject to an opaque method of collective self-regulation by the Parties, rather than employing independent adjudicative expertise to ensure the objectives of Part 3 defined in Article LAW.GEN.1 are being fulfilled.

### *3.4 Termination – 'selective exit'?*

The mechanisms for termination continue this theme. Prima facie, Article LAW.OTHER.136 provides for an unconditional and unilateral means of termination: 'each party *may…at any moment* terminate' Part 3 of the Agreement.[153] The only procedural conditions are that the termination is effected through written notification via diplomatic channels. The paragraph also provides for a 'cooling off'[154] period whereby the termination only take effect 9 months after notification.[155] Notice of termination triggers an obligation for the Specialised Committee to meet and decide upon the measures needed to ensure that 'any cooperation initiated under this Part is concluded in an appropriate manner'.[156] The primacy of personal data protection is placed at the forefront once more through the obligation for the parties to 'ensure that the level of protection under which the…data were transferred is maintained after the termination'.[157] The protection of personal data is so imperative that the obligations upon the Parties to do so may transcend the temporal life-time of the cooperation, and presumably this obligation would only expire if the entirety of the Trade and Cooperation Agreement were terminated in accordance with Article FINPROV.8.[158]

The structure of the termination clause bears similarities to Article 50 TEU on withdrawal from the European Union.[159] The permission to provide notice of termination at any time echoes the unilateral and unconditional sovereign right of withdrawal that constitutes the first objective of the withdrawal clause.[160] The role for the Specialised Committee to conclude cooperation appropriately mirrors the second objective defined in *Wightman* of an 'orderly process' for the execution of a Member State's withdrawal.[161] Under this comparison, the nine-month period before the termination comes into effect echoes the two-year period mandated under Article 50 as the residual condition for withdrawal if an agreement is not reached.

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[149] ibid art FINPROV.3.
[150] ibid art LAW.OTHER.135(1).
[151] ibid art LAW.OTHER.135(2).
[152] ibid Article LAW.OTHER.135(3).
[153] ibid art LAW.OTHER.136(1).
[154] On 'cooling off periods' see Carlos Closa, 'Is Article 50 Reversible? On Politics Beyond Legal Doctrine' (*Verfassungsblog*, 4 January 2017) <https://verfassungsblog.de/is-article-50-reversible-on-politics-beyond-legal-doctrine/> accessed 16 April 2020.
[155] EU-UK TCA art LAW.OTHER.136(1).
[156] EU-UK TCA art LAW.OTHER.136(3).
[157] ibid Article LAW.OTHER.136(3).
[158] ibid art FINPROV.8.
[159] Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).
[160] *Case C-621/18 Wightman v Secretary of State for Exiting the European Union [2018] OJ C 445/10*.
[161] ibid.

Article LAW.OTHER.136(2) provides for a special temporal rule when termination occurs as a result of denunciation by the United Kingdom or a Member State of the European Convention on Human Rights. In such a situation, a guillotine clause comes into effect whereby Part 3 ceases in force on the date of the denunciation, or the 15th day following notification if already denounced.[162] The immediacy of termination in such a scenario is evidence that adherence to pre-existing external international law guarantees for the protection of individual rights is the condition *sine qua non* for cooperation between security authorities.[163] The distinct temporal rules also indicate the differences from the initial withdrawal under Article 50 – whereas the UK as a withdrawing Member State remained bound by the Charter of Fundamental Rights, thus guaranteeing individuals' protection during the 'orderly procedure' for withdrawal, no such protection would remain in force in the event of a termination resulting from denunciation of the ECHR, thus necessitating immediate cessation. The reciprocity of the obligation in the event of denunciation by an EU Member State reveals that adherence to the EU's 'own' instrument of the Charter of Fundamental Rights is insufficient to maintain the foundations of cooperation.[164]

The possibility of 'selective exit'[165] from specific fields of co-operation signifies the transformation in UK-EU relations from a holistic constitutional basis to piecemeal and iterative engagement. In this respect, Article FINPROV.8 should be regarded as the analogue to Article 50, and Article LAW.OTHER 136 and the other means of terminating sectoral co-operation may be regarded as akin to the Protocols that enabled the United Kingdom to opt-out from *inter alia* the AFSJ during membership.[166] The crucial difference that marks out the new intergovernmentalism from supranational constitutionalism is that either the EU or the UK is free to engage in selective exit at any point during the life-time of the TCA, whereas the creation of new opt-outs from pre-existing constitutional sectors was only available during times of treaty amendment when the UK was a Member State.[167]

### *3.5 Suspension – compromise intergovernmentalism?*

The possibility of the compromise mechanism of suspension, under Article LAW.OTHER.137, signifies another departure from the method of supranational constitutionalism. Either Party may suspend either the whole of Part 3, or only certain Titles, if the other Party fulfils the conditions for suspension. The possibility of selective suspension of Titles provides a tailored instrument to address deficiencies, as problems may arise only in relation to discrete central authorities responsible under one of the Titles, and as such the cooperation can be maintained insofar as possible within the areas and under the Titles which are not affected by fundamental rights or rule of law failings.

The condition for suspension is '*serious* and *systemic deficiencies* within one Party as regards the *protection of fundamental rights* or the *principle of the rule of law*'.[168] The further formal conditions are that the Party must specify these deficiencies and must issue a written

[162] EU-UK TCA Article LAW.OTHER.136(2).

[163] 'Long Read | Will the UK Uphold Its Commitment to Human Rights?' (n 119).

[164] Although it should be noted that accession to the ECHR is a condition for membership of the EU and therefore such a denunciation would also be intolerable to the EU institutions.

[165] JHH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403; Carlos Closa, 'Interpreting Article 50 : Exit and Voice And✝what about Loyalty?' (2016) Working Paper <http://cadmus.eui.eu//handle/1814/44487> accessed 1 February 2017.

[166] See discussion in section 2.1 above.

[167] Protocol (No 36) provided an exception to this rule, on the basis that it created a time-limited option for the United Kingdom to cease of pre-existing police and judicial cooperation measures on the basis of resistance to the new jurisdiction of the CJEU over these measures. See section 2.1 above 'TRADE AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN UNION AND THE EUROPEAN ATOMIC ENERGY COMMUNITY, OF THE ONE PART, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, OF THE OTHER PART OJ L 444, 31.12.2020, p. 14–1462' (n 17) art LAW.OTHER.136(3)..

[168] EU-UK TCA art LAW.OTHER.137.

notification. This demonstrates again that fundamental rights protection functions as the condition *sine qua non* for continuing cooperation. It should, however, be noted that the condition has been watered down since the draft versions of the Treaty, which declared that suspension could be enacted if a party 'abrogated' its domestic implementation of the European Convention on Human Rights.[169]

The 'serious and systemic deficiencies' condition implies that, for example, if the United Kingdom replaced the Human Rights Act 1998, this would not be a sufficient condition for suspension. The wording of systemic deficiencies seems to be a transplant of the conditions established by the Court of Justice to regulate removals of asylum seekers under the Dublin asylum system.[170] Therefore, the examples of such deficiencies given by the Luxembourg court may be used as a guide for what phenomena would justify suspension of Part 3 of the TCA. One could argue that such a practice would bring the Parties close to defining features of the TCA by reference to 'concepts of EU law', a negotiating red-line for the United Kingdom, and a situation that is explicitly excluded under the agreement.

In this respect, it may be diplomatically important that the wording is also reminiscent of the European Court of Human Rights' condition for rebuttal of the '*Bosphorus* presumption' whereby EU Member States do not violate the Convention if they are implementing EU obligations, unless the protection is 'manifestly deficient'.[171] The Strasbourg Court's definition of 'manifest deficiency' could be a more appropriate means of determining when suspension of Part 3 may be justified, as its origins lie with a 'neutral' arbiter under an international agreement that both the UK and all of the EU Member States are parties thereto.

The inclusion of the 'principle of the rule of law' reconnects the procedures for governance with the objectives contained within Title I whereby the rule of law is listed as one of the commitments that cooperation is based upon. However, this also marks a departure from the substantive Titles of Part 3, throughout which fundamental rights and individual freedoms are the only 'constitutional' principles explicitly incorporated into the provisions. The inclusion of the principle of the rule of law also broadens out the conditions for suspension beyond the focus on human rights guarantees contained within the draft versions of the agreement. Intrigue may arise from the fact that, whereas the United Kingdom has been the party most likely to deviate from the European Convention on Human Rights,[172] Member States on the EU side of the equation are the parties that have been accused of deviations from the rule of law.[173] As it may be interpreted that 'within one Party' in relation to the EU also encompasses 'within the Member State legal systems', it may be speculated whether further deterioration in the situations within Poland and Hungary could lead to the United Kingdom government seeking to justify suspension. A further analogy with the 'serious and systemic' wording may be drawn to Article 7 TEU, and the conditions of a 'clear risk of a serious breach' of the Article 2 TEU values to commence monitoring, and 'serious and persistent breach' of such values as the condition for suspension of voting rights.[174] Although the United Kingdom has been loath to utilise EU concepts and actions as a barometer, it may use any such future Article 7 proceedings as a justification for suspension. This would function as an

[169] 'Long Read | Will the UK Uphold Its Commitment to Human Rights?' (n 119).

[170] *N S v Secretary of State for the Home Department and M E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [2011]*.

[171] 'BOSPHORUS HAVA YOLLARI TURIZM VE TICARET ANONIM SIRKETI v. IRELAND' para 156 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69564%22]}> accessed 19 January 2021.

[172] Although the current UK government has also flirted with undermining the rule of law during the Brexit constitutional crises. See 'United Kingdom Internal Market Bill: A Rule of Law Analysis of Clauses 42 to 45' <https://binghamcentre.biicl.org/publications/united-kingdom-internal-market-bill-a-rule-of-law-analysis-of-clauses-42-to-45> accessed 19 January 2021; 'In a Democracy the Rule of Law Means Parliament Is Supreme over the Executive' <https://binghamcentre.biicl.org/comments/57/in-a-democracy-the-rule-of-law-means-parliament-is-supreme-over-the-executive> accessed 19 January 2021.

[173] Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

[174] TEU art 7.

external manifestation of the internal phenomenon whereby certain Member States have sought to suspend the operation of the European Arrest Warrant in relation to Poland due to concerns that the systemic breaches of the rule of law and other EU values may undermine the protection of individual rights.[175]

The prevalence of protection of personal data throughout Part 3 is demonstrated again by the sister provision in paragraph 2, whereby the same condition of 'serious and systemic deficiencies' may lead to suspension. The data protection suspension limb is further complemented by the provision that such deficiencies may 'include' the situation in which a relevant adequacy decision has ceased to apply.[176] This recognises the further unilateral lock that exists in relation to data protection, and the examples of these decisions are delineated in paragraph 3, and in relation to specific suspensions of Title II on PNR and Title X on anti-money laundering in paragraph 4. By comparison to the more nebulous definition of serious and systemic failings in relation to fundamental rights and the rule of law, the termination of adequacy decisions by 'technocratic' bodies may provide a more concrete reason for suspension by political actors in relation to data protection.

Article LAW.OTHER.137(5) defines the temporal framework for an orderly suspension of cooperation. As with termination, parallels to the process for withdrawal under Article 50 TEU emerge. Again, a cooling off period applies – the suspended Titles provisionally cease to apply only three months after notification.[177] Two features of the suspension process make the analogy to Article 50 here more apposite: this three-month period may be extended, and there is the possibility for reversal of a suspension, akin to revocation of notification of intention to withdraw. Indeed, there is greater prescription for the process of withdrawal of a notification of suspension then for the silent power of revocation under Article 50 – the withdrawal of notification of suspension must be enacted two weeks before the end of the cooling-off period, and it must be issued in writing through diplomatic channels. The theme of 'selective' disapplication emerges again, as the Parties also have the option to engage in a 'reduction in scope of the suspension' through a second notification, rather than complete reversal of suspension.

A further remedial feature of the suspension clause provides further substantiation of the new public international law intergovernmental footing for EU-UK relations. Paragraph 6 provides for a right of massive retaliation – if one Party suspends one or several Titles, the other Party has permission to suspend *all* of the remaining Titles, through written notification, with three months' notice.[178] This right provides further evidence that the mechanisms for disapplication under Part 3 more closely adhere to the paradigm of sanctions in public international treaty law[179] rather than adjudication and remedies through supranational constitutionalism.

Paragraphs 7 and 8 mandate an 'orderly process' for the suspension of cooperation. The dual-institutional structure of the withdrawal clause, whereby the European Council sets guidelines for a withdrawal agreement under Article 50 TEU, and the Commission acts as the 'Union negotiator', is mirrored in separate roles for the Partnership Council and the Specialised Committee on Law Enforcement and Judicial Cooperation. The role of the Specialised Committee under paragraph 8 is most reminiscent of the role of the Commission as Union negotiator of the withdrawal agreement, as its purpose is to 'decide what measures are needed to ensure that…cooperation…is concluded in an appropriate manner'.[180] Personal data protection remains at the forefront, through the replication of the formula found for termination that the level of protection at the time of transfer must be maintained beyond suspension.

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[175] *Case C-216/18 PPU, REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 23 March 2018, received at the Court on 27 March 2018, in proceedings relating to the execution of European arrest warrants issued against LM* ECLI:EU:C:2018:586.

[176] EU-UK TCA art LAW.OTHER.137(2).

[177] ibid art LAW.OTHER.137(5).

[178] ibid article LAW.OTHER.137(6).

[179] {Citation}

[180] EU-UK TCA Article LAW,OTHER.134(8).

Article LAW.OTHER.137 marks a departure from the analogy with Article 50 TEU insofar as the role of the Partnership Council is to attempt to mitigate or even prevent the suspension through the obligation to 'explore possible ways…to postpone its entry into effect, to reduce its scope, or to withdraw it'.[181] Upon recommendation from the Specialised Committee, four measures are open to the Partnership Council: agreement on joint interpretation; recommendation on appropriate action; appropriate adaptations to address the underlying reasons for 12 months; and extension of the suspension period by three months.[182] These proactive intergovernmental compromises are reminiscent of an earlier feature of the Brexit saga: the abortive 'New Settlement for the United Kingdom within the European Union',[183] which also made (futile) provision for 'declarations' on pre-existing legal obligations to avoid disintegration. Whereas such executive-driven incursions into the constitutional order were arguably incompatible with supranationalism during the attempt to prevent Brexit,[184] such measures fit appropriately within the flexible 'new old' intergovernmentalism of the TCA. This suggests a coherent strategic thread whereby, upon failure to create such a position for itself within the European Union, the UK has pursued the same method of governance outside of membership.

Article LAW.OTHER.137(9) and (10) cover the rules for the reversal of suspension and the reinstatement of cooperation. Paragraph 10 provides a coherence guarantee function, by decreeing that reinstatement of the Titles enacted through the 'massive retaliation' under paragraph 6 by the Party responsible for the deficiencies will occur at the same time as the Titles suspended through original notification.[185] Paragraph 9 may raise a point of legal interpretative dispute of interest to scholars. The first sentence makes temporal provision for the reinstatement of suspended Titles – the first day of the month after written notification by the other party of its intention to reinstate the suspended titles.[186] The next sentence engages in linguistic imprecision, which may be an example of 'constructive ambiguity': 'The Party having notified the suspension…*shall do so* immediately after the serious and systemic deficiencies…have ceased to exist'.[187] On a cursory reading, the ordinary construction of the lexicon may indicate that the general verb 'to do so' refers to the immediate preceding sub-clause of 'notifying suspension'. However, the final sub-clause that defines the condition for the obligation as being the cessation of the serious and systemic deficiencies would make this construction illogical. Therefore, the most reasonable interpretation seems to be that the verb 'to do so' refers to the previous sentence's final sub-clause – the written notification by the suspending Party of its intention to reinstate the suspended title. Although convoluted, if this interpretation is correct it marks an important feature of the legal architecture of suspension. A Party that suspends Part 3 or selected Titles does not have a discretionary *permission* to commence reinstatement if the breaches cease; instead, paragraph 9 creates an *obligation* to notify reinstatement in such an event. From a holistic point of view, this may be regarded as a device to ensure that remedial action is time-limited and proportionate to the triggering events. In practice, this may create litigious dispute regarding the obligation, and what exactly constitutes the cessation of 'serious and systemic deficiencies'.

### *3.6 Dispute settlement – non-adjudicative diplomacy*

The dispute resolution mechanism in Title XII aspires to the characteristics of being 'swift, effective and efficient' as a means not only to settle disputes but also for 'avoiding' them, with the end-goal

[181] ibid Article LAW.OTHER.137(7).
[182] ibid Article ;AW.OTHER.137(7).
[183] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16.
[184] Garner (n 5).
[185] EU-UK TCA Article LAW,OTHER.137(10).
[186] ibid art LAW.OTHER.137(9).
[187] ibid.

of a 'mutually agreed solution'.[188] Although not stated explicitly, the objective of the Title makes it clear that Part 3 provides for political dispute resolution through diplomacy, rather than legal dispute resolution through adjudication. This is a specific manifestation of the TCA's general orientation on disputes: Mark Konstantinidis and Vasiliki Poula observe that 'despite the extensive arbitration provisions, the TCA expresses a strong preference in favour of political consultations before resorting to arbitration.'[189] The dispute settlement mechanisms in Title XII can be forwarded as predicative of Part 3's grounding in the paradigm of intergovernmental diplomacy rather than supranational constitutionalism. The focus on political 'consultations'[190] as the locus for resolution signifies the deactivation of the 'juridical constitution'[191] of the European Union in relation to the United Kingdom and its nationals as objects of norms.

Article LAW.DS.2 defines the scope of the dispute settlement mechanisms, and the provisions that are excepted from the 'covered provisions'.[192] These exempted measures include the provisions on the suspension and disapplication of Title II on Prüm cooperation,[193] suspension of Title III on PNR cooperation,[194] and the general provisions on termination[195] and suspension.[196] The exclusion of these provisions is justifiable on the basis of their status as *lex specialis* with relation to disputes resulting from specific circumstances, such as the fundamental rights and rule of law violations. The carving out of the Prüm and PNR Titles may indicate the significance for the EU of protecting the integrity of these Titles as the cooperation comes so close to participation in supranational legal norms.[197]

Further exempted measures are Article LAW.GEN.5 on the scope of cooperation where an opt-out Member State no longer participates in analogous EU law measures,[198] and Article LAW.PNR.28(14) on retention of PNR data. Again, the former provision may be regarded as a *lex specialis* form of disapplication, as it provides the permission for the UK to notify its intention to cease to apply the relevant provisions of Part 3 if another of its former opt-out Member State colleagues ceases to participate in the analogous provision of the AFSJ.[199] The latter provision is a further example of *lex specialis* on termination, as it provides for a right of suspension of Title III if the United Kingdom considers a refusal by the Partnership Council to grant an extension to the interim period for it make technical adjustments to enable the deletion of PNR data at the end of the retention period to be unjustified.[200]

The procedural architecture of the political dispute settlement mechanism is found in Article LAW.DS.4 on consultations. The Parties are obliged to enter into consultations in 'good faith' with the aim of a 'mutually agreed solution'.[201] The operation of this concept is defined in Article LAW.DS.5 – the Specialised Committee may adopt the decision, but if it concerns a joint interpretation of provisions the Partnership Council must adopt it too, and the Parties are obliged to

[188] ibid Article LAW.DS.1.

[189] 'From Brexit to Eternity: The Institutional Landscape under the EU-UK Trade and Cooperation Agreement' (*European Law Blog*, 14 January 2021) <https://europeanlawblog.eu/2021/01/14/from-brexit-to-eternity-the-institutional-landscape-under-the-eu-uk-trade-and-cooperation-agreement/> accessed 20 January 2021.

[190] EU-UK TCA art LAW.DS.4.

[191] Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015).

[192] EU-UK TCA ART LAW.DS.2(2)(a)-(g).

[193] ibid Article LAW.PRUM.19.

[194] ibid art LAW.PNR.38.

[195] ibid art LAW,OTHER.136.

[196] ibid art LAW,OTHER.137 and art LAW.DS.6.

[197] See discussion in section x.x above.

[198] EU-UK TCA art LAW.GEN.5.

[199] Protocol (No 19) 19; TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland 20; TEU and TFEU, Protocol (No 22) on the position of Denmark 21; TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice 21.

[200] EU-UK TCA arts LAW.PNR.29(9)-(14).

[201] ibid art LAW,DS.4(1).

take the necessary implementing measures within the agreed time-period.[202] These time-periods may be modified by mutual agreement of the Parties.[203] The complaining Party has a permission to seek consultations, and must issue such a request in writing, including the reasons, and identification of the acts or omissions claimed to be in breach and the specific provisions affected.[204] Paragraph 3 prescribes a two week deadline for the responding Party to reply, and establishes a framework for consultations to be held 'regularly' within three months after request, either in person or by other means.[205] The first meeting must take place within one month after a request for dispute resolution.[206] These consultations must be concluded within three months, unless there is mutual agreement to extend this period.[207] Paragraph 6 provides the complaining party with a unilateral power to withdraw a request for consultations, leading to the immediate termination of consultations – such an explicit mechanism echoes the unwritten right of revocation under Article 50 TEU, continuing the analogies between the supranational withdrawal clause and the legal arrangements that have resulted from the exercise thereof by the United Kingdom.[208]

Paragraph 5 determines the institutional involvement in dispute settlement. The complainant has the discretion to specify either the Specialised Committee or the Partnership Council as the forum for consultations. Each institution also has a degree of agency over the process, as the former may refer the matter to the latter 'at any time', and the latter has the power to 'seize itself of the matter'.[209] The most important sentence of the clause is the statement that '[t]he Specialised Committee on Law Enforcement and Judicial Cooperation, or as the case may be, the Partnership Council, may *resolve the dispute by a decision*'.[210] This permission for the political institutions governing Part 3 confirms that dispute settlement thereunder is a diplomatic rather than adjudicative process. Such a decision is assigned the quality of a 'mutually agreed solution', demonstrating that the Partnership Council and the Specialised Committee function as intergovernmental agents for the sovereign will of the United Kingdom and the EU and its Member States, rather than institutions with a distinct supranational legal personality.

The detailed temporal framework, the prescriptions for action to be taken, formal requirements for the Parties, and the institutional setting means that the lack of formal adjudicative mechanisms does not mean that dispute resolution is a discretionary and unregulated political process – instead, such resolution takes place within a closely detailed legal framework. This means that dispute resolution will not be arbitrary, and instead will be subject to legal certainty. Article LAW.DS.6 prescribes a possible remedial consequence of the dispute settlement procedures, through the creation of a *lex specialis* form of suspension to complement the general mechanisms mandated in Title XII.

A final significant observation from the perspective of EU law scholarship is the provision on exclusivity.[211] On first reading, the obligation for the Parties 'not to submit a dispute…to a mechanism of settlement other than provided for in this Title'[212] seems to enshrine the United Kingdom's red-line against jurisdiction of the Court of Justice of the European Union. From the perspective of the EU's interests, however, Article LAW.DS.3 also serves the purpose of functioning as a guarantee of the autonomy of EU law, or in this case the autonomy of EU action mandated *by* (international) law, by ensuring the United Kingdom cannot bring claims regarding Part 3 to any other international courts or tribunals.

[202] ibid art LAW.DS.5(2) AND (3).
[203] ibid art LAW.DS.7.
[204] ibid article LAW.DS.4(2).
[205] ibid art LAW.DS.4(3).
[206] ibid art LAW.DS.4(5).
[207] ibid art LAW.DS.4(4).
[208] See subsections on termination and suspension above for further examples of the analogy.
[209] EU-UK TCA art LAW.DS.4(5).
[210] ibid.
[211] ibid art LAW.DS.3.
[212] ibid.

## 4. Conclusion

Federico Fabbrini argues that 'if the Brexit referendum of 23 June 2016 was an historical *event*, what followed from it can only be characterized as a historical *process*.'[213] The current staging post on this journey also reveals a *constitutional* process whereby the UK's engagement with law enforcement and judicial cooperation with the EU has transitioned away from (disrupted) supranationalism to a 'new old' intergovernmentalism. Whereas the *substance* of Titles II-Title IX may be argued to simulate – to varying degrees of integration – the provisions of the AFSJ, the *structure* of Part III revives the old Third Pillar of the European Community on Justice and Home Affairs. Governance through political diplomacy rather than juridical constitutionalism is the resurrected paradigm.

Part 3 may therefore be regarded as the result of a process of 'backwards-looking'[214] revisionism. As Fabbrini observes, however, the TCA also precipitates a 'forward-looking'[215] perspective: 'the EU-UK Trade and Cooperation Agreement is unlikely to represent the end of the Brexit process…the Agreement creates a framework in which the EU and the UK are expected to continue adjusting their relationship'.[216] Such mechanisms for future adjustment are present throughout Part 3. However, it seems that such potential development may only affect the degree of convergence or divergence of the substance of relations along a fixed continuum of intergovernmental relations. The absence of provisions that may enable a role for supranational political and legal institutions suggests that the Rubicon dividing a supranational constitutional Area of Freedom, Security and Justice from an international law relationship has been permanently crossed.

[213] Federico Fabbrini, 'From the Withdrawal Agreement to the Trade & Cooperation Agreement: Reshaping EU-UK Relations' (Social Science Research Network 2020) SSRN Scholarly Paper ID 3756331 14–15 <https://papers.ssrn.com/abstract=3756331> accessed 22 January 2021.

[214] Neil Walker, 'After Finalité? The Future of the European Constitutional Idea' (Social Science Research Network 2007) SSRN Scholarly Paper ID 1022586 <http://papers.ssrn.com/abstract=1022586> accessed 13 January 2016.

[215] ibid.

[216] Fabbrini (n 215) 14.