7

The EU–UK Trade and Cooperation Passenger Name Records Provisions: Framing the Effectiveness of Degrees of Legalisation and Institutionalisation*

The EU–UK Trade and Cooperation PNR Provisions

Elaine Fahey*

I. Introduction

The topic of Passenger Name Records (PNRs) constitutes one of the most long-term, evolving and consistently controversial areas of European Union (EU) law in the Area of Freedom, Security and Justice (AFSJ). It has resulted in several highly controversial international agreements, much litigation and a directive with extraordinary origins from the 9/11 era of law -making.[1] This chapter focuses upon its most recent and significant inclusion in a trade agreement with the UK, the EU– –UK Trade and Cooperation Agreement (TCA). The~~PNR~~ law relating to PNRs is usually found externally in international agreements with third countries. The TCA is highly striking as a trade agreement, in which~~where~~ PNRs are~~ is~~ found in a lengthy

~~* Thanks to Ivanka Karaivanova for research assistance. Thanks to the editors for helpful comments received.~~ ~~The chapter develops further arguments in E. Fahey, E. Guild and EM. Kuskonmaz (2023) The Novelty of EU Passenger Name Records (PNR) in EU Trade Agreements: On Shifting Uses of Data Governance in Light of the EU-UK Trade and Cooperation Agreement PNR Provisions. *European Papers – A Journal on Law and Integration*. 8 (1): 273-299; and E. Fahey (2023) 'The life cycle of passenger name records in European Union law – on the normalisation of crisis' (2023) *Irish Jurist*. 70: 211.~~

* Thanks to Ivanka Karaivanova for research assistance. Thanks also to the editors for helpful comments received. The chapter develops further arguments in E Fahey, E Guild and EM Kuskonmaz, 'The Novelty of EU Passenger Name Records (PNR) in EU Trade Agreements: On Shifting Uses of Data Governance in Light of the EU–UK Trade and Cooperation Agreement PNR Provisions' (2023) 8(1) *European Papers – A Journal on Law and Integration* 273; and E Fahey, 'The life cycle of passenger name records in European Union law – on the normalisation of crisis' (2023) 70 *Irish Jurist* 211.

[1] E~~.~~ Fahey, ~~(2023)~~ 'The life cycle of passenger name records in European Union law – ~~–~~on the normalisation of crisis' (2023) 70 *Irish Jurist*~~. 70:~~ 211.

Commented [CM1]: Please read your chapter with care: there would seem to be a few odd footnote placings (see from n 25 on) and some perhaps unnecessary repetition (perhaps you moved copy and forgot to delete the 'old' placing?).

Commented [GD2]: I think the word 'Agreement' should be in here.

Commented [CM3]: In this collection of essays, the 'short heads', which run across the very top of each page of a chapter, comprise the authors' names (left hand pages) and the chapter title (right hand pages). If a chapter title is too long for the space available for a short head (about 41 characters, including spaces), it will be shortened. This is the suggested short head for this chapter; it is for the typesetter's information only, and will not appear in this position on the printed page. If you would prefer something else (bearing in mind the limit), please let me know.

Commented [CM4]: For your interest, any footnote that precedes the start of the main text should not be numbered - here, an asterisk has been substituted for original n 1 (that was attached to the chapter title). Given that you are being invited to add one or more new footnotes, please make sure to run a full check of all footnote cross-references (highlighted in blue for the attention of the typesetter). Given that (currently) nn 1 and 2 below cite the same two works cited in the asterisked footnote, might the citations of those works in that asterisked footnote be removed and replaced with (say) 'The chapter develops further arguments set out in the works cited in nn 1 and 2 [or maybe '3'] following.'? Please consider.

Commented [CM5]: Please note that, for consistency with other contributions in this collection), the noun Passenger Name Records (plural) is abbreviated as 'PNRs' and the adjective (eg 'PNR law') is abbreviated as 'PNR'. Please bear in mind as you review the essay.

Commented [CM6]: Ideally, the full citation of the TCA (currently in n 8 below) should appear in a footnote attached at the end of this sentence, since this is the first time the Agreement is mentioned. Please consider.

Commented [CM7]: Please note that abbreviations should not start a sentence, unless they are true acronyms (ie words or names made from the initial characters of other words and spoken as such, eg UNESCO, NATO, scuba). So that PNR does not appear at the start of this sentence, this small change has been made.

chapter ~~thereof~~. Several decades on since its introduction into EU law, PNR law shows no sign of abating. Most of all it has failed to quell concerns as to its evolution, increasingly normalising it into ordinary EU law – ~~-~~ but largely following on from a series of controversial ~~CJEU~~ decisions of the Court of Justice of the EU (CJEU). The EU now has a range of transfer PNR agreements with many non-EU countries, with several under negotiation, and which continue to be complex to renegotiate and ~~continue to~~ which evolve in line with case law. The AFSJ, which Article 3(2) of the Treaty on European Union sets out as an 'area', has been gradually 'regularised' over time as a legal and institutional space and has had a booming legislative agenda since the entry into force of the Treaty of Lisbon.

Passeger Name Records embod~~ies~~ many of the key characteristics of shifts in AFSJ law over time, evolving into a significant but also multifarious morass of law. Arguably the high-water mark of PNR law is constituted by the PNR chapter in the TCA, which provides for a range of new legal parameters for the treatment of PNRs in EU law, dominated by shifts in oversight provisions that are implemented in the TCA unlike in any other international PNR agreement of the EU.

Increasingly, PNR law is also ~~increasingly~~ subject to judicial review.[2] Most concerns and much litigation have centred heavily upon oversight. This is despite the proliferation of PNR law, first as external relations law then as internal EU law. The CJEU's capacity to ameliorate its oversight elements has increasingly become critical, over~~in~~ the past number of years, from a human rights perspective, as will be outlined further below. ~~PNR law has evolved~~ As the EU AFSJ increasingly securitises and witnesses shifts in the use of PNR data stemming from borders and migration control, PNR law has evolved. Somewhat paradoxically and ironically, PNR appears ~~somewhat paradoxically and ironically~~ to be engaged in both deepening and widening its ostensible institutionalisation, evident in the TCA. Data transfer law has been heavily court-centric, but has also witnessed the CJEU's prescribing detailed outcomes in the

[2] See further in E. Fahey, E. Guild and EM. Kuskonmaz, '~~(2023)~~ The Novelty of EU Passenger Name Records (PNR) in EU Trade Agreements: On Shifting Uses of Data Governance in Light of the EU–UK Trade and Cooperation Agreement PNR Provisions' (2023) 8(1) ~~.~~ *European Papers* – ~~-~~ *A Journal on Law and Integration* ~~8 (1):~~ 273 ~~299~~.

Commented [CM8]: Since this seems to be the only reference to the TEU, the abbreviation is not needed, but please note that all treaties, directives, conventions, etc should ideally be cited in full in footnotes the first time they are mentioned, to assist readers, who may simply copy and paste the full citation into their search engine. Note that adding a new footnote citing the TEU in full (including its OJ reference, in the style, eg, [2000] OJ C123/45) will in fact be useful, as it will negate the need to amend footnote cross-references, caused by removing old n 1. Please consider. (Since the Treaty of Lisbon is also mentioned in this sentence, you might like to cite both treaties in full in the same footnote, attached to the end of the sentence.)

Commented [CM9]: If you are referring to a different numbered section (or subsection) of the chapter, please use a section cross-reference instead of 'below', in the style, eg, 'in section IV.A'. (Cross-references will be formatted for online readers by the typesetter.)

Commented [CM10]: Please note that 'PNR' (singular) is used as an adjective, while the noun Passenger Name Records (as indicated in the first sentence of the chapter) needs to be abbreviated to PNRs. With that in mind, please check 'PNR appears' here; should it read 'PNR law appears' (or even just 'it appears'). Please advise.

Commented [CM11]: You may recall that the possessive case is called for before a verbal noun (ie gerund), which is where the present participle of a verb is used in place of a noun (here, 'prescribing' instead of 'prescription'). If you do not care for 'CJEU's prescribing detailed outcomes', you might prefer 'CJEU's prescription of detailed outcomes' instead.

review of PNR law.[3] It invites ~~begs~~ the question as to the place of oversight of these provisions and their broader place.

The law applying to PNRs ~~law~~ seems to be evolving, with an increasing number of actors becoming involved in its governance, reflecting both its controversies and challenges. This is particularly well embodied by the EU–~~-~~UK TCA provisions on PNRs, where oversight becomes a key feature in the wake of *Opinion 2/15*, arguably as a form of *institutionalisation*, witnessed through turns towards deepening structures, more efforts to develop transparency, accountability and to embed actors as part of a range of processes.[4] The ~~PNR~~ law on PNRs arguably reflects other areas of the AFSJ in showing significant *legalisation and institutionalisation* tendencies. There are multiple agreements, instruments and rules in the form of legalisation. ~~-~~This shift is thus demonstrated in a morass of emerging law ~~emerging~~, particularly of instruments, actors and powers. In this regard, this shift may be said to provide evidence of legalisation, a legalisation that is paradoxical and ironic, where its proliferation is responsive yet also responding to multiple subjects and objects and pursuing more agendas, but not necessarily with fundamental rights and the rule of law in mind.

This ~~e~~ chapter thus explores descriptively the recent evolution of PNR law in EU external relations law, evolving into a trade agreement, with a plethora of new actors and oversight provisions through the framing of this evolution as degrees of legalisation and institutionalisation. Oversight is a key means to examine these developments, as one of the most important legal issues arising in EU law for PNRs in this period. It considers legalisation in section II~~2~~, situating PNRs as an evolution of the AFSJ through law initially, moving now in the TCA into a trade agreement. Section III~~3~~, on institutionalisation, sets out the many actors involved in~~of~~ PNR oversight, and section IV~~4~~ discusses the early outcomes of that oversight, which appear to indicate unimpressive effectiveness, despite the many layers of governance (which are also non-transparent and difficult to decipher). The chapter concludes, in section

Commented [CM12]: Since you already mention that PNR law has evolved, in the preceding paragraph, might this sentence be amended to read (say) 'An increasing number of actors are becoming involved in the governance of PNR law, reflecting both its controversies and challenges.'? Please consider.

[3] Fahey (n 2).

[4] See E~~.~~ Fahey, ~~(2023)~~ *The EU as a Global Digital Actor* (~~-~~Hart Publishing, 2023) ~~-~~Introduction. See also *Opinion 1/15*, ~~of the CJEU~~ ECLI:EU:C:2017:592.

V~~5~~, that PNR law generally appears to have many shortcomings that are not easily remedied or ameliorated by the TCA, however significant their presence there might be~~is~~.

II. On (Over)Legalisation?

The AFSJ was estimated to account for ~~be~~ approximately 30 per cent ~~%~~ of the ~~European Union's (~~EU's~~)~~ legislative output just a few years ago.[5] The AFSJ still suffers, despite this normalisation, from contradictions in practice.[6] First~~ly~~, there is a reasonable amount of legislation~~,~~ but few Court decisions until recently. Second~~ly~~, it is also a highly complex area, with significantly more treaty law/~~-~~protocols/~~-~~decisions on the AFSJ than on legislative matters, not necessarily reflecting more law and policy but rather the incomplete nature of integration, differentiation practices and partial institutionalisation. Third~~ly~~, where there is case law with respect to the AFSJ, some of it is characterised as generating extraordinary levels of injustice, as opposed to the history of free~~-~~movement law as a provider of rights and redress. Yet, fourth~~ly~~, at the same time, much substantive AFSJ law~~-~~making is now conducted using maximalist harmonisation and nearly always increasingly using external norms. More law~~-~~making in substantive areas of policy beyond procedural rules has also coincided with a period characterised by a plethora of soft law instruments and instruments designed to evade judicial review, ~~being~~ deployed to manage core aspects of AFSJ migration policy in times of crisis. In

Commented [CM13]: Please see the citation highlighted in the footnote. Is that edited volume the same one as is cited previously in the same footnote? What is the correct title please? If it is the same edited volume, please substitute the following short-form citation of it 'in Ripoll Sarvant and Trauner (eds) ibid 336'.

Commented [CM14]: Since there are two works by you cited in the preceding footnote, 'Fahey (n ?)' is not appropriate in this footnote. Please clarify which of your works is meant by using a short-form including its title, eg "Fahey, 'The Evolution of Transatlantic Legal Integration' (n ?)". If both works are meant, please use short-forms for both, separated by a semi colon.

---

[5] E~~.~~ De Capitani, ~~(2020)~~ 'Progress and Failure in the Area of Freedom, Security and Justice' ~~.~~ ~~-~~in F~~.~~ Bignami (ed), *EU Law in Populist Times* (Cambridge University Press~~. CUP:~~, ~~-~~2020) 387; R~~.~~ ~~-~~Dehousse and O~~.~~ ~~-~~Rosenburg ~~(2015)~~ 'There Has Been a Substantial Drop in EU Legislative Output Since 2010'. *LSE EUROPP* (~~.~~ ~~-~~3 February ~~.~~2015) available at~~from:~~ https://blogs.lse.ac.uk/europpblog/2015/02/03/there-has-been-a-substantial-drop-in-eu-legislative-output-since-2010/ (~~Last accessed~~last accessed 4 April 2024). ~~;~~ See also A ~~.~~ ~~-~~Ripoll Servent and F~~.~~ Trauner (eds), ~~(2017)~~ *Routledge Handbook on Justice and Home Affairs* (~~.~~ ~~-~~Routledge, 2017); E~~.~~ Fahey, ~~(2017)~~ 'The Evolution of Transatlantic Legal Integration: Truly, Madly, Deeply? EU—US Justice and Home Affairs' ~~.~~ in A~~.~~ Ripoll Servent and F~~.~~ Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (~~.~~ Routledge, 2017) ~~:~~ 336~~-345~~; E~~.~~ Fahey (2021) 'The Rise and Fall of International Law in the Post-Lisbon AFSJ Legislation Cycles' (2021) 1 ~~.~~ *Groningen Journal of European Law*~~. 1:~~ 1.

[6] Fahey (n 6); E~~.~~ Fahey (2019) 'Hyper-legalisation and delegalisation in the AFSJ: on contradictions in the external management of EU migration' ~~.~~ in J~~.~~ Santos Vara et al ~~and others~~ (eds), *Constitutionalising the External Dimensions of Eu Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (~~.~~ Edward Elgar, 2019).

such times, there is an increasing number of soft law tools in EU external migration, used to enable flexibility, deploying management lexicon, principles and tools as a means to avoid or minimalise the need for 'hard' binding law (e.g., codes, frameworks, compacts, action plans).

Part Three, Title III of the TCA expressly states that it deals with the transfer, use and processing of 'passenger name record data' gleaned from flights between the Union and the UK, and provided to the UK's 'competent authority'; it also establishes 'specific safeguards' governing the data's use. All such data must be processed 'strictly' for the purposes of 'preventing, detecting, investigating or prosecuting terrorism or serious crime' or, in 'exceptional cases', where it is necessary 'to protect the vital interests of any natural person'. The processing of PNR data has 'become a widely used essential law enforcement tool, in the EU and beyond, to prevent and fight terrorism and other forms of serious crime, such as drugs-related offences, human trafficking, and child sexual exploitation'.[7] It thus evinces a wide array of legal purposes, methods and actions to engage in the regulation of PNRs. It is significant that it has evolved as a legal subject area to this point.

The TCA represents a high-water mark of EU third-country engagement in the area of PNRs because, unlike any other agreement, it contains a PNR-dedicated chapter. Agreements on PNRs usually tend to be found within/alongside trade agreements with third countries or on foot thereof, as evidence of deepening justice and home affairs collaborations. The evolution of PNR law into a trade agreement might be understood to be esoteric for some reasons. For some, Part Three of the TCA – the section dealing with law enforcement and judicial cooperation in criminal matters – indicates a spectrum of continuity/discontinuity in cooperation from 1 January 1, 2021 onwards.[8] Although it constitutes an initial loss of operational efficiency and a diminution of formal British government influence over the

Commented [CM15]: Please consider transposing the full citation of the TCA to the new footnote suggested in the first paragraph of the chapter.

[7] European Commission, 'Migration and Home Affairs'. Available from:available at https://home-affairs.ec.europa.eu/policies/law-enforcement-cooperation/passenger-data_en (Last accessedlast accessed 4 April 2024).

[8] 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 (EU–UK TCA) [2021] OJ L149/10; e.g. TJ Wilson, (2021) 'EU–UK criminal justice and security cooperation after Brexit: A perspective'. (2021) 3 *Forensic Science International: Synergy*. 3. 100144; S. Wolff, A. Piquet and H. Carrapico, (2022) 'UK's withdrawal from Justice and Home Affairs: a historical institutionalist analysis of policy trajectories'. (2022) 20 *Comparative European Politics*. 20. 604.

strategic development of EU criminal justice law, institutions and operational priorities, it makes provision for 'business as usual' in PNR law as to general continuity for data sharing (biometric and vehicle data via the Prüm arrangements and criminal records), PNR screening and confiscation measures. Yet the placement of PNR law in a trade agreement, that is~~ie~~ the TCA, labelled as a 'cooperation' agreement, is noticeable~~,~~ as a significant evolution of the legalisation of PNR law ~~–~~ and a very obvious form of *less* business as usual, marking significant change and legal form development.[9] In this regard, the operational nature of the TCA is one genre of study~~,~~ whereas the substantive locus of PNR law constitutes another.

The placement of PNR provisions in a trade agreement in the TCA is argued here to be a very noticeable effort at institutionalisation and legalisation in the face of other~~–~~country rejection thereof. The UK as a leader in PNR developments has been a key hallmark of PNR law and innovations, which makes the TCA all the more remarkable. This is because the trajectory of PNRs appears to have soured somewhat, given lesser interest from other third countries perhaps, as will be explored below, ~~–~~where PNR negotiations have been simply abandoned (i~~.e~~ with Japan).[10] The view has been expressed in the United States (U~~.~~S)~~.~~ that the stringency of CJEU case law has reached its peak, subjecting countries like the U~~.~~S~~.~~ to standards not applicable within the EU itself. This situation makes the amelioration of EU~~–~~US PNR difficult.[11] The TCA arguably represents a significant legalisation of PNR developments, and this is no surprise in an era where PNRs are~~is~~ used for multiple purposes arguably beyond their~~its~~ original design ~~–~~ ~~–~~in particular in~~ts~~ border control.[12]

Commented [CM16]: Hart does not like to see 'ie' or 'eg' in the main text, unless within brackets, hence this small change.

Commented [CM17]: Might (say) 'driver' be a little more apt than 'hallmark' here? Please consider.

Commented [CM18]: If a different section is meant here, please use a section cross-reference in place of 'below'.

[9] On terminology, see P~~.~~ Van Elsuwege ~~(2021)~~ 'A new legal framework for EU-UK relations: some reflections from the perspective of EU external relations law'~~.~~ (2021) 6(1) *European Papers* ~~.6(1):~~ 785.

[10] For background, see E~~.~~ Fahey and I~~.~~ Wieczorek ~~(2022)~~'The European Parliament as a Defender of EU Values in EU~~–~~Japan Agreements: What Role for Soft Law and Hard Law Powers?' ~~.~~(2022) 47 *European Law Review* ~~.47.~~ 331.

[11] For ~~space~~ reasons of space, it is not possible to consider these issues ~~are not possible to consider~~ further, but see K~~.~~ Propp, ~~(2022)~~ 'Why sharing passenger data doesn't fly for the EU's top court'~~.~~ *Atlantic Council* (~~.~~7 July 2022)~~.~~ ~~Available from:~~available at ~~https://~~www.atlanticcouncil.org/blogs/new-atlanticist/why-sharing-passenger-data-doesnt-fly-for-the-eus-top-court/ (~~Last accessed~~last accessed 4 April 2024).

[12] ~~E.~~ Fahey, ~~E.~~ Guild and ~~EM.~~ Kuskonmaz (n 2~~2023~~) ~~The Novelty of EU Passenger Name Records (PNR) in EU Trade Agreements: On Shifting Uses of Data Governance in Light of the EU-UK Trade and Cooperation Agreement PNR Provisions. *European Papers - A Journal on Law and Integration*. 8 (1): 273-299~~.

More broadly, however, the controversy surrounding PNR law continues unbated as the evolution of crisis law post-9/11, and is thus carried over into external relations more centrally.[13] The entrenchment of crisis law -making as to PNRs, first ly as external relations law, subsequently as internalised EU law in the form of a directive, has entailed its increasing legalisation, deepening securitisation in EU law and the controversial concept of the crisis in the AFSJ.[14] The difficulty with the legalisation emerging then, reaching into the EU strongest competences externally in a trade agreement, controversially also is that it adds a veneer of respectability and legitimisation to the evolution of PNR law. This is because of the lack of direct effect of EU trade agreements (explicitly provided for in the TCA)[15] and the lack of transparent reporting regimes surrounding the implementation of trade agreements, irrespective of their bureaucratisation.[16] Thus the enhanced sophistication of the expression of the PNR provisions may provide evidence of the AFSJ as an area of law, but its proliferation of sources, instruments and outcomes is not per se something of consequence from a positive perspective. Even with more layers of oversight, legalisation does not in itself present per se a positive trajectory. Ironically, better governance and enhanced reporting, and more actors inside this new placement of PNR law, may simply indicate its over-legalisation, without any benefits whatsoever, and may thus follow the trajectory of much AFSJ law despite the PNR law's placement in the TCA *qua* trade chapter.

The next Section III examines the TCA PNR actors; we will return ing to the early evaluation of the TCA in section IV4.

III. On Institutionalisation

[13] Fahey (n 2).

[14] V Mitsilegas, (2020) 'The Preventive Turn in European Security Policy. Towards a Rule of Law Crisis' in In In F Bignami (ed) *EU Law in Populist Times*. Cambridge University Press (n 5).

[15] See P Eeckhout, (2022) 'Brexit Sovereignty and its Dead Ends' (2022) 13 *Global Policy* 13: 98.

[16] W Weiß, (2018) 'Delegation to treaty bodies in EU agreements: Constitutional constraints and proposals for strengthening the European Parliament' (2018) 14(3) *European Constitutional Law Review* 14(3): 532; C Eckes and P Leino-Sandberg, (2022) 'The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?' The(2022) 85 *Modern Law Review* 85: 164.

Commented [CM19]: Should 'as' perhaps read 'given' or 'following'? Please consider.

Commented [CM20]: Please add the first page number of Mitsilegas' contribution, at the end of the footnote citation.

Commented [CM21]: Should 'EU' read 'EU's'? Please check.

Commented [CM22]: A small change to avoid repetition of 'per se' in two adjacent sentences.

~~IV.~~III.

Typesetter – please take in Table 7.1 near here (within section III) – see file Davies and Carrapico_Table 7.1 Fahey)

~~Actor~~	~~Article~~
~~Competent authority~~	~~543~~
~~Passenger Information Units (PIU)~~	~~543~~
~~Specialised Committee on Law Enforcement and Judicial Cooperation (Specialised Committee)~~	~~552~~
~~Independent administrative body~~	~~552~~
~~Judicial review~~	~~553,~~ ~~544~~
~~Partnership Council~~	~~1.4h~~

Table 7.1: The Actors in~~of~~ PNR Oversight

Commented [CM23]: Since several authors in a collection may have submitted tables and figures, it is always best to use the chapter number when numbering them, to avoid confusion (by the copyeditor and typesetter!) if several Tables 1 are sent.

There are many actors involved in the PNR TCA provisions. These actors, several new, several committee-like, form an important web of protections for citizens, but perhaps also a murky morass of entities that do not uniformly have citizens at~~to~~ the forefront ~~thereof~~.

A plethora of actors are~~is~~ provided for in the TCA, involved in tasks such as governance, supervision, communication, transfer, review~~,~~ and accountability that can broadly be said to relate to oversight. These include a competent authority, Passenger Information Units (PIUs), the Specialised Committee on Law Enforcement and Judicial Cooperation ('the Specialised Committee'), independent reviews, a judicial review~~,~~ and the Partnership Council, which are variously provided for in Part Three, ~~-~~Title III TCA. This is in addition to the broader governance structure of the TCA.[17] Whether they are cumulatively significant remains to be seen. Whether the TCA PNR provisions are compatible with the CJEU's *Opinion 1/15*, particularly as to oversight, ~~-~~also remains to be seen.~~-~~[18]

Commented [CM24]: For your interest, since you used 'A plethora of actors', the noun matches with 'actors'; if you had written 'The plethora of actors', the noun would have matched with 'plethora'. (In other words, the verb depends on whichever noun is specific.) So, here, 'are' is used instead of 'is'. (Tricky but useful!)

[17] See N ~~-~~Levrat, ~~(2021) -~~'Governance: Managing Bilateral Relations' in, ~~In~~ F ~~-~~Fabbrini (ed), *The Law & Politics of Brexit*, ~~-~~vol ~~une~~ 3: *The Framework of New EU –UK Relations* (~~-~~Oxford University Press, ~~÷~~2021) 219.

[18] Statewatch, ~~(2021) -~~'Brexit: Commission answers to EU member state questions on the Trade and Cooperation Agreement' (~~-~~25 January 2021)~~-~~ ~~Available from:~~available at

The concept of 'competent authority' is defined in Article 543 of the TCA. The phrase 'UK competent authority' means a U~~nited~~ K~~ingdom~~ authority competent for the prevention, detection, investigation or prosecution of terrorist offences or serious crime that has been notified to the European Commission in accordance with Article 7(3) of the Passenger Name Record Directive.[19] The competent authority is pivotal to the operation of PNRs, including being responsible for receiving and processing ~~of~~ PNR data under the TCA. Under Article 543(d), t~~T~~he ~~Passenger Information Units (~~PIUs~~)~~ serve as the competent authority for the Member States:

> '~~Passenger~~ Information Units ('~~543 (d)~~ PIUs') means~~are~~ the Units established or designated by Member States that are responsible for receiving and processing PNR data.~~'.~~'[20]

The competent authorities and PIUs, in turn, must 'cooperate' with one another, which provides a rare instance of bilateral institutional cooperation provided for under the TCA. A list of competent authorities is provided for in law.[21]

The main powers of the competent authority to use PNR data ~~of the competent authority~~ are set out in Article 544 of the TCA, entitled~~on the~~ 'Purposes of the use of PNR data', which ~~. It~~ provides ~~that~~:

> '~~2.~~ In exceptional cases, the [UK] competent authority may process PNR data where necessary to protect the vital interests of any natural person, such as:
> (a) ~~-~~risk of death or serious injury; or
> (b) a significant public health risk, in particular as identified under internationally recognised standards.~~'~~

Under Article 551, it is provide~~d~~s that the governing principles of the competent authority, outlining automated processing of PNR data, entail that:

Commented [CM25]: Please add a full citation of the PNR Directive (including its full title of OJ reference) in n 19. Please also add the SI number of the Regulations, in the style (SI 2018/1234).

Commented [CM26]: Please note that quotations must be reproduced verbatim, even as to errors or omissions (though those may be flagged up by the use of '[*sic*]').

Commented [CM27]: Usually, quotations are displayed only if they exceed a specified number of words (about 40), but quotations from statutes and other instruments can be an exception to the rule if most of a provision (or a full sentence from a provision) is being quoted.

Commented [CM28]: Is the OJ reference highlighted in the footnote a part of the title of the document cited, or should it be styled in the usual way (see, eg, n 8 above)?

~~https://~~www.statewatch.org/news/2021/january/brexit-commission-answers-to-eu-member-state-questions-on-the-trade-and-cooperation-agreement/ (~~Last accessed~~last accessed 4 April 2024).

[19] The Passenger Name Record Data and Miscellaneous Amendments Regulations 2018.

[20] In the UK this is the Home Office (National Border Targeting Centre Independent Compliance Governance Team).

[21] Competent authorities designated by the United Kingdom under Part Three of the Agreement: Law Enforcement and Judicial Cooperation in Criminal Matters (2021/C–117 I/02). ~~Available from:~~available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021X0406(02) (~~Last accessed~~last accessed 4 April 2024).

> ‘The [UK] competent authority shall ensure that any automated processing of PNR data is based on non-discriminatory, specific, and reliable pre-established models and criteria …

Article 552(3) on retention of PNR data finally provides for unmasking powers, to the effect that:

> ‘The [UK] competent authority may unmask PNR data only if it is necessary to carry out investigations for the purposes set out in Article 544. Such unmasked PNR data shall be accessible only to a limited number of specifically authorised officials.’

The competent authority entity or concept is to be distinguished from the ‘independent administrative body’, as referred to in Articles 552(7), 552(11)(d), 552(12)(a) and 553 of the TCA, since the latteris body has explicitly to be independent from the UK competent authority (UK PIU) and perform governance. This independence is necessary to ‘assess on a yearly basis the approach applied by the [UK] competent authority as regards the need to retain PNR data pursuant to paragraph 4’.[22] It is also the only entity expressly mandated to ensure ‘oversight’ in relation to PNR data pursuant to Article 554.[23] Thus, it ostensibly complies with the CJEU’s *Opinion 1/15*. The independent authority is required to supervise compliance with and enforcement of data protection. It is therefore a key actor of change in the TCA, marking a shift away from the EU–Canada PNR Agreement. This follows not only from the TCA but also from Article 36 of the Law Enforcement Directive (LED), as it requires the EU to monitor the compliance withof the data protection conditions by third countries, including a periodic review to reassess the adequacy decision. Therefore, Article 525(3) of the TCA provides that the Specialised Committee will be responsible for overseeing the data protection rules applicable to the cooperation under Part III.

Article 546(1)–(4) provide, s–that the UK competent authority shall share data ‘upwards’ and ‘horizontally’ with Europol or Eurojust, or horizontally with the PIUs of the Member States ‘as soon as possible in specific cases where necessary to prevent, detect, investigate, or prosecute terrorism or serious crime’.[24] However, pursuant to Article 546(6)

Commented [CM29]: Should a paragraph number be added after ‘554’ in the footnote? If not, perhaps n 23 is not in fact necessary? Please consider.

Commented [CM30]: This Directive does not seem to be cited in full anyway in the chapter. Please add a footnote citing it in full after ‘(LED)’.

Commented [CM31]: Should ‘III’ read ‘Three’ (see earlier references to this Part of the TCA)?

[22] EU–UK TCA, Art 552(7).

[23] EU–UK TCA, Art 554.

[24] Article 546(2) of the TCA provides: ‘At the request of Europol or Eurojust, … the United Kingdom competent authority shall share PNR data, the results of processing those data, or analytical information containing PNR data, in specific cases where necessary to prevent, detect, investigate, or prosecute terrorism or serious crime.’

~~para. 6~~, the UK competent authority and the PIUs of the Member States are required to ensure that only the minimum amount of PNR data necessary is shared under paragraphs (1) ~~to~~ (4).

Beyond these bodies sits a Specialised Committee on Law Enforcement and Judicial Cooperation.[25] Here, the TCA establishes a committee to assist the parties in their endeavour to reach a consensual solution and to foster their cooperation when allegations of breach of their duties under the TCA arise. The agenda and minutes of the Specialised Committee are online but do not clarify its membership in these documents. It has powers to take reports and thus provides for reporting and accountability~~.~~.[26] Article 552(12) of the TCA provides that the UK

> shall provide~~report~~ to the Specialised Committee on Law Enforcement and Judicial Cooperation ~~as follows,~~ ~~:~~nine months after the entry into force of this Agreement and again a year later if the interim period is extended for a further year:
>
> a report from the independent administrative body~~'~~ …~~.~~[27]

At the time of writing, the agenda and minutes of the ~~its~~ Specialised Committee's meetings reference~~s~~ ongoing reviews of a wide range of activity, yet consistently featuring PNR issues.[28]

---

[25] See ~~eg~~the~~.~~ European Commission website on the minutes of the Specialised Committee on Law Enforcement and Judicial Cooperation, ~~. Available from:~~available at https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement/specialised-committee-law-enforcement-and_en (~~Last accessed~~last accessed 4 April 2024).

[26] The provision further specifies that the report '~~[]~~ shall include the opinion of the [UK] supervisory authority referred to in Article 525(3) as to whether the safeguards provided for in paragraph 11 of this Article have been effectively applied'~~.~~ ~~:~~ The UK shall also provide to the Specialised Committee on Law Enforcement and Judicial Cooperation 'the assessment of the [UK] of whether the special circumstances referred to in paragraph 10 of [Art~~icle~~ 552] persist, together with a description of the efforts made to transform the PNR processing systems of the [UK] into systems which would enable PNR data to be deleted in accordance with paragraph 4 of [Art~~icle~~ 552]'~~.~~ ~~:~~ See Art 552~~-~~(12)~~-~~(a) and (b), respectively, of EU~~–~~UK TCA.

[27] Thus Art 549(4) develops the next layer of oversight: it provides that 'The [UK] competent authority shall promptly inform the Specialised Committee on Law Enforcement and Judicial Cooperation of any significant incident of accidental, unlawful or unauthorised access, processing or loss of PNR data.' ~~EU .~~ See A~~.~~ Janet (2021) 'Dispute settlement and jurisdictional issues for law enforcement and judicial cooperation in criminal matters under the EU–UK trade and cooperation agreement'. New Journal of European Criminal Law. 12: 290.

[28] eg TCA implementation, Mutual Legal Assistance (Art~~icle~~ 635), DNA-profiles and fingerprints (Prüm) ex ante evaluation (Art~~icle~~ 540),~~.~~ Passenger Name Record Data – UK report and assessment (Art~~icle~~ 552), Mutual assistance on traffic offences (Art~~icle~~ 640(7) TCA) 4. Passenger Name Record data – update and expiration of derogation on Article 552(4) 5. Anti-Money Laundering – (Article 654 TCA) 6. Exchanges of DNA, fingerprints and vehicle registration data under Title II of Part Three of the TCA (akin to intra-EU 'Prüm').

Commented [CM32]: Please check the text of n 25; it would seem to be more appropriate to set it out in n 26 instead, given that the sentence to which that is attached refers to the agenda and minutes of the Committee. Perhaps you might cut and paste the text currently in n 25 into n 26, inserting (say) a reference to the relevant Article of the TCA dealing with the Committee into n 25 instead? Please consider.

Commented [CM33]: Again, please check the text of n 26 in light of the sentence to which it is attached. The text of what is currently n 26 would seem to apply more appropriately to the quotation following from Art 552(12). Please make sure that both n 26 and n 27 (at the end of the quotation following) are correctly placed and refer to the right provisions.
In current n 26, which provision is meant by 'The provision' at the start of the footnote, if not Article 552(12)?

Commented [CM34]: Please confirm the accuracy of the quotation (paragraphs must be formatted as they are in the source, ie rather than being run on to the rest of the quotation).

Commented [CM35]: Should '(a)' be added at the start of this line? Please check.

Commented [CM36]: Please check the text of n 27, which does not seem to follow from the quotation set out here. Has something been inadvertently deleted between the foregoing quotation and the identifier for n 27? Please consider and see the preceding comments about nn 25-27.

Commented [CM37]: Please check n 28. A list of numbers (4. to 6.) suddenly appears halfway through the footnote, but there is no sign of 1.-3. Please clarify the footnote and confirm that it is indeed listing examples of ongoing reviews, as suggested in the main text here..

~~As to courts,~~ There are few references to courts in the PNR provisions. The terms 'court or independent administrative body', as~~were~~ mentioned in Article 552(7), refer to and on their~~its~~ face comply with the requirements set out by the CJEU in ~~its~~ *Opinion 1/15* on the use and disclosure of PNRs. *Opinion 1/15* found that such~~this~~ had to be 'subject to prior review either by a court or by an independent administrative body'~~).~~.[29] However, courts play a much more limited role in just ~~only~~ two~~2~~ instances. Articles 553 and 544 of the TCA reference the capacity of a court to conduct a prior review or compel oversight. For instance, the competent authority has to process data where compelled by a court. Yet, overall, there are few such instances. Thus, the term 'independent body' is, as a result, arguably highly confusing. The title overall puts more faith in an independent administrative body than in courts and other tribunals, since the court has only one review competence in Article 553(2). The independent administrative body has ~~thus~~ to be independent from the UK competent authority, as referred to in Article 552(7), which requires~~prescribes~~ the body to conduct an assessment 'on a yearly basis [of] the approach applied by the United Kingdom competent authority as regards the need to retain PNR data pursuant to paragraph 4'. Article 553 provides that the use of PNR data is subject to prior review by a court or independent administrative body based on a reasoned request by the UK competent authority, in those~~e~~ cases when the UK competent authority will use PNR data

> ~~'~~retained in accordance with Article 552 for purposes other than security and border control checks, including any disclosure under Article 555 and Article 556, only where new circumstances based on objective grounds indicate that the PNR data of one or more passengers might make an effective contribution to the attainment of the purposes set out in Article 544~~'~~.[30]

Article 552(7), in conjunction with Article 552(12)~~-~~(a), also provides that the ~~[~~UK~~]~~ shall ensure that a domestic supervisory authority responsible for data protection will have the power to supervise compliance with and enforcement of data protection. The UK is required to inform the EU of ~~the~~ implementation and compliance.~~-~~ On the face of it, these provisions operate as a series of multiple governances and accountability checks.

In addition to all the above, the TCA also establishes the Partnership Council – chaired by both the UK and EU – at the apex thereof to oversee the implementation, application~~,~~ and interpretation of the TCA. Art Institutional provision 1.4.h provides that it can make

Commented [CM38]: The ECLI citation in this footnote is not the same as that given for *Opinion 1/15* in n 4. Are both correct? Please check.

Commented [CM39]: Please clarify 'at the apex thereof'; do you perhaps mean 'with overall responsibility'?

Commented [CM40]: What is this, please?

[29] *Opinion 1/15* ~~-~~on the Draft agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data, ECLI:EU:C:2016:656, para 208.

[30] EU~~–~~UK TCA, Art 553(1).

recommendations to the parties regarding the transfer of personal data in specific areas covered by this Agreement or any supplementing agreement. The Partnership Council also seeks to resolve any issues that may arise during the implementation of the TCA and can also delegate some of its powers to the Trade Partnership Specialised Committees. The Partnership Council can amend certain parts of the TCA, 'provided that such amendments are necessary to correct errors, or to address omissions or other deficiencies', and can take binding decisions regarding the implementation of the TCA.[31] The function of the Partnership Council becomes significant directly and indirectly to oversight issues. Under the terms of Part Three of the TCA, the UK has been permitted to derogate from the obligation to delete all PNR data after individuals leave the UK if it applies additional safeguards designed to protect PNR data for an interim period. These additional safeguards reflect the C~~ourt of J~~ustice of the EU's *Opinion 1/15* of 26 July of 2017~~82~~ on the legality of the EU/Canada PNR Agreement and are listed in Part Three. The law enforcement agreement states that the UK has been allowed to derogate from this principle on the basis of 'special circumstances' that prevent the Government from 'making the technical adjustments necessary to transform the PNR processing systems,' ~~(~~which the UK operated while EU law applied~~)~~ 'into the systems which would enable PNR data to be deleted' in accordance with paragraph 4. These 'special circumstances' are not explained further.[32] For instance, the PNR data of most travellers has to be deleted after their stay in the UK has ended, which is an important development in line with *Opinion 1/15*.[33] However, the UK did not have to apply this particular provision for at least one year, and this derogation could be extended for another year if the Partnership Council agreed to it pursuant to Article 552(13) of the TCA. This has occurred twice under the ~~TC~~Agreement, pursuant to two decisions of the Partnership Council ~~to date~~ at the time of writing, discussed next.[34]

Commented [CM41]: Please make sure that all subsequent footnotes cite the correct information and/or works, given the odd situation noted in nn 25-27 above.

Commented [CM42]: Please clarify the footnote.

Commented [CM43]: Please note that this point has already been noted earlier in the paragraph. In any event, with respect, it does not flow on from the preceding sentences. If you do delete this sentence, please make sure to accept the deletion (by clicking 'Accept This Change' in the drop-down box next to 'Track Changes'), in particular of the n 33 identifier at its end, otherwise your subsequent footnotes will not renumber correctly and you will have a gap in their numbers.

---

[31] 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/C 384 I/01 [2019] OJ C384I/1, Art 164.

[32] See UK House of Lords.

[33] EU–UK TCA, Art 552(4); *Opinion 1/15* (n 4~~7~~)~~:~~ paras 205–206.

[34] Decision No 2/2021 of the Partnership Council established by the 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 of 21 December 2021 as regards the extension of the interim period during which the United Kingdom may derogate from the obligation to delete Passenger Name Record data of passengers after their departure from the United Kingdom [2021] OJ L~~-~~467/6; Decision No 2/2022 of the Partnership Council established by the 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 of 21 December 2022 as regards the second and last extension of the interim period

~~V.~~ The Early Outcomes of Oversight in the TCA

~~VI.~~IV.

A. On Process and Procedure

The PNR data of travellers who~~that~~ are not suspected of crimes and whose information is not needed for law enforcement purposes could thus be kept by the UK for another two years before the deletion obligation comes into force. The application of this provision has been reviewed.[35] The scope ~~bandwidth~~ for manoeuvre on such sensitive data is thus a matter of some concern, largely evading oversight, as it does ~~oversight~~. It has been argued that the EU should not be tied by any arbitrary deadline and consider the overall protection of data being transferred at every opportunity.[36] However, this decision was taken early in the relationship, ~~this decision was taken~~ with swift application. The first meeting of the Specialised Committee on Law Enforcement and Judicial Cooperation took place on 19 October 2021, with minutes published only several months later, where, pursuant to Article 552 of the TCA, ~~they considered~~ the UK report and assessment of Passenger Name Record Data was considered. The~~y~~ Specialised Committee noted that the opinion of the UK supervisory authority, included with the report of the independent administrative body (IAB) provided under Article 552(12) of the TCA, was based only on the information contained in the report of the IAB. The UK indicated that in view of the unique situation arising as a result of Covid-19, the UK supervisory authority was prepared to provide a note to complement its opinion in November, following a review of the operation of the interim period safeguards undertaken directly by the UK supervisory authority.[37] It is difficult to see any legal provision for this 'note' or to evaluate its potential

during which the United Kingdom may derogate from the obligation to delete Passenger Name Record data of passengers after their departure from the United Kingdom [2022] OJ L-328/153.

[35] Council Decision (EU) 2021/2293 of 20 December 2021 on the position to be taken on behalf of the Union in the Partnership Council established by the Trade and Cooperation Agreement with the United Kingdom regarding the extension of the derogation from the obligation to delete passenger name record data of passengers after their departure from the United Kingdom [2021] OJ L458/514.

[36] E. Massé, ~~(2021)~~ 'Access Now's memo on the data transfers and PNR provisions under the EU–UK Trade Agreement'. *Access Now* (January 2021). ~~Available from:~~available at ~~https://~~www.accessnow.org/cms/assets/uploads/2021/01/EU-UK-Deal-Data-transfers-PNR.pdf (~~Last accessed~~last accessed 4 April 2024).

[37] European Commission ~~(2022)~~ 'First Specialised Committee on Law Enforcement and Judicial Cooperation under the EU–UK Trade and Cooperation Agreement' (2022) ~~Available from:~~available at

legal salience. Then, in the second decision of the TCA (Decision 2/2021) Partnership Council (Decision 2/2021), it agreed on a decision on the extension of the interim period on 21 December 2021.[38] The EU position, taken on the Union's behalf in the Partnership Council pursuant to Article 552(13) of the TCA, was to agree to extend the interim period during which the United Kingdom might may derogate from the obligation to delete the PNR data of passengers after they depart from the United Kingdom by one year, until 31 December 2022, which was renewed again in 2022 until the end of 2023. The second Partnership Council decision extending this period until the end of 2023 was expressed conclusively and finitely as to its extension period.[39]

The House of Lords European Union Committee asked the Government to explain the 'special circumstances' that permitted the UK derogation under Part Three and it received a terse reply that:

> '…the phrase 'special circumstances' reflects the position the UK is in. Formerly, as a member state, we were cooperating under the PNR directive. As a third country, the EU is now required to treat us as a third country and therefore the CJEU opinion in respect of the EU–Canada Agreement applies to the UK in this respect. At the moment, our technical systems are not set up in a way that can fully comply with the requirements in the Agreement.'[40]

It also asked the Minister to clarify the exact nature of the 'independent administrative body' that will annually police the UK's adherence to standards in relation to PNR data retention. Minister Kevin Foster MP replied:

> 'The National Border Targeting Centre's independent compliance governance team, a functionally independent part of the UK's passenger information unit, not involved in the

Commented [CM44]: Might this footnote be more simply styled 'Decision No 2/2021 of 21 December 2021 (n 34).'? Please consider.

Commented [CM45]: Is the document cited in this footnote a command paper? If so, please style in the correct manner, in accordance with OSCOLA para 3.4.3.

---

https://ec.europa.eu/info/publications/first-specialised-committee-law-enforcement-and-judicial-cooperation_en (Last accessed last accessed 4 April 2024).

[38] UK Trade and Cooperation Agreement Partnership Council, Decision No 2/2021 of the Partnership Council Established by the 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, of 21 December 2021.

[39] eg Article 1 of Decision No 2/ of 2022 (n 34) provides: 'The interim period during which the United Kingdom may derogate from the obligation under Article 552(4) of the Trade and Cooperation Agreement to delete Passenger Name Record data of passengers after their departure from the United Kingdom is extended for a second and last time until 31 December 2023 pursuant to Article 552(13) of that Agreement.''.

[40] House of Lords European Union Committee, (2021) *Beyond Brexit: policing, law enforcement and security* (*European Union Committee*, 25th Report of Session 2019–21, 26 March). Available from:available at https://committees.parliament.uk/publications/5298/documents/52902/default/ (Last accessed last accessed 4 April 2024).

operational use of PNR data, has been designated by the Home Secretary as the independent body to undertake this work.'

Commented [CM46]: Please note that a footnote sourcing this extract is required at its end.

The depth of this independence remains to be seen and appears complex to evaluate. Thus far, non-governmental organisations (NGOs) ~~NGOs~~ remain concerned.[41] Notably, on 22 February 2021, the European Data Protection Supervisor also issued a non-binding Opinion questioning the legality of aspects of these arrangements, including the use of the TCA as the sole legal basis for exchanging PNR data with the UK, and the potential three-year length of the derogation, points that appear important to consider.[42] It is worth remarking that the previous derogations were granted on the basis that the UK would be complying and deleting such data as part of the EU position in the Council Decision.[43] The Home Secretary further wrote in late 2023 to the House of Lords Justice and Home Affairs Committee undertaking as much, and a recent European Commission report on the implementation and application of the TCA in 2023 mentions only, without more, the successful operation of the provisions:

> ~~'~~Implementation of the TCA in relation to law enforcement and judicial cooperation functioned smoothly … on the transfer of PNR data by air carriers to the UK for flights between the EU and the UK, in line with Article 552(15) of the TCA, the interim period expired on 31 December 2023 … From 1 January 2024, the United Kingdom must delete a passenger's PNR data …, unless a risk assessment indicates a need to retain such data …[44]

Commented [CM47]: Please read the whole extract carefully and then consider whether, for sense, 'on the transfer' should read '[O]n the transfer'. (Previously an ellipsis followed by a full stop (period) appeared after 'smoothly', but a full stop is never inserted after an ellipsis (which encompasses the missing full stop).

---

[41] See T~~.~~ Bunyan and C ~~.~~ Jones, ~~(2022)~~ 'Brexit: Goodbye and hello: The new EU-UK security architecture, civil liberties and democratic control'. *Statewatch* ~~(.~~ 20 January ~~.~~ 2022) ~~Available from:~~available at ~~https://~~www.statewatch.org/brexit-goodbye-and-hello-the-new-eu-uk-security-architecture-civil-liberties-and-democratic-control (~~Last accessed~~last accessed 4 April 2024).

[42] ibid~~:~~ 19; Opinion on the conclusion of the EU and UK trade agreement and the UK and EU exchange of classified information agreement~~.~~ (22 February~~).~~ ~~Available from:~~available at https://edps.europa.eu/system/files/2021–02/2021_02_22_ opinion_eu_uk_tca_en.pdf (~~Last accessed~~last accessed 4 April 2024).

[43] Council Decision (EU) 2022/2574 of 19 December 2022 on the position to be taken on behalf of the Union within the Partnership Council established by the 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, as regards the extension of the interim period referred to in Article 552(11) of that Agreement during which the United Kingdom may derogate from the obligation to delete Passenger Name Record data of passengers after their departure from the United Kingdom [2022] OJ L 334/98.

[44] Home ~~Office (2023) Home~~ Secretary, Letter to Baroness Sally Hamwee, Chair, House of Lords Justice and Home Affairs Committee ~~(.~~ 18 October~~.~~ 2023) ~~Available from:~~available at https://committees.parliament.uk/publications/41869/documents/207633/default/ (~~Last accessed~~last accessed 4 April 2024); European Commission COM(2024) 127 final on the implementation and enforcement of the Trade and Cooperation Agreement 1 January ~~–~~ 31 December 2023 ~~.~~ ~~Available from:~~available at https://commission.europa.eu/document/download/def518e5-144b-4e73-a54a-5b078544da48_en?filename=COM-2024-127_0_en.pdf (~~Last accessed~~last accessed 4 April 2024).

Despite the phraseology and emphasis upon the mandatory nature of the obligation, there is no other detail provided as to ~~its~~ compliance with it or enforcement.

B. Evaluation the TCA PNR Actors and Actions

There was scant information available at the time of writing as to *how* these decisions on the PNR derogation were arrived at and its implications. Their evaluation is thus more complex. The effectiveness of the Partnership Council, in particular, in securing effective oversight above and beyond the breath of the generous PNR provisions, generous to transfers more than oversight perhaps, has been a concern for many.[45] Nonetheless, while all such issues are essentially moot in the face of the expiry of the derogation, the procedures expose the breadth and latitude granted to the UK as to data transfer in the area of PNRs, irrespective of the framing of the latitude. They also show the veneer of oversight operating here, through layers of actions, actors and procedures.

The vast range of oversight actors provides an example of the layers of institutionalised governance emerging. However, their effectiveness and the actual reach of the layers remains to be seen.[46] Early analyses of the TCA are highly critical of the outcomes relative to the labyrinth of bodies and structures.[47] The TCA has an additional later layer of annual reporting that remains the substantive difference, along with the putative layer of courts engaging in judicial review. The opaqueness of the layers of TCA PNR governance will arguably continue to be problematic.

The extensive range of data transfers taking place therein unifies academics, civil liberties groups ~~,~~ and NGOs alike in their opposition thereto, not dissimilar to most PNR law, which attracts wide-ranging and reasonably unified condemnation of its existence.[48] Notably,

Commented [CM48]: A small point, but do layers 'reach'? Perhaps 'coverage' might be more apt? Please consider.

Commented [CM49]: Please note that when citing working papers, it is usual to give the most recent link to the paper, followed by its full date (in the style '18 November 2009'). Please consider adding these to the Garner citation in the footnote.

Commented [CM50]: If you wish to retain this sentence, please cite both the ECHR and the GDPR in the footnote attached to the end of it.

[45] See, eg, ~~the~~ submissions and outline arguments of comments received throughout in House of Lords European Union Committee (n 40) ~~s 'Beyond Brexit'~~.

[46] See Levrat (n 17).

[47] See Bunyan and Jones (n 414).

[48] ibid; O~~.~~ Garner, ~~(2021)~~ '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?' Brexit Institute Working Paper Series ~~–~~No 1/2021.

threats ~~exist~~ still existed at the time of writing on the part of the UK Government post-Brexit, to exit the Council of Europe European Convention on Human Rights~~ECHR~~ and to allegedly 'reform' the General Data Protection Regulation in the Data Protection and Digital Information (No~~.~~ 2 Bill).[49]

V. Conclusions

The topic of PNRs constitutes one of the most long-term, evolving and consistently controversial areas of E~~uropean~~ U~~nion~~ law in the AFSJ. It has resulted in several highly controversial international agreements, much litigation and a directive with extraordinary origins from the 9/11 era of law ~~-~~making. Passenger Name Record law has become a victim of a constant cycle of litigation. This is evident most recently in relation~~as~~ to the PNR Directive challenge, where the CJEU sought to rewrite Belgian law in *Ligue des droits humains*. Given the highly controversial nature of PNR law, ~~is highly controversial and as a result,~~ its checks and balances have generated much concern. Various litigants, from the European Parliament to NGOs, have sought to litigate it. However, again paradoxically, a corpus of law has evolved from the CJEU that is not necessarily producing ameliorated outcomes. Legalisation and institutionalisation are argued here to be a core feature of PNR law embodying AFSJ, where it proliferates over a relatively short period of time. Whether it evolves to be an effective oversight system remains to be seen. The TCA provisions indicate a higher degree of legalisation of PNRs to date, which is important and worthwhile, particular in light of the significance of data in the TCA. Yet from a more specific perspective, PNR law shows an evolution here that is difficult to match when compared with other partners. There appear to be many shortcomings and challenges of ~~-~~PNR law generally ~~appears to have many shortcomings and challenges~~ that are not easily remedied or ameliorated by the TCA, however significant the TCA PNR provisions may be.

Commented [CM51]: If this is a reference to a CJEU decision of this name, please add a footnote citing it in full.

[49] UK Government, ~~(2022)~~ *The Benefits of Brexit: how the UK is taking advantage of leaving the EU* (~~-~~January ~~-~~2022) ~~Available from:~~available at ~~https://~~www.gov.uk/government/publications/the-benefits-of-brexit (~~Last accessed~~last accessed 4 April 2024).