

WHO'S TRUSTING WHO? OBSERVATION OF FUNDAMENTAL RIGHTS IN JUDICIAL COOPERATION AFTER BREXIT

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ABSTRACT

On 1 May 2021, the EU–UK Trade and Cooperation Agreement (TCA) entered formally into force. This article asks whether mutual trust exists after Brexit and whether it plays any role in the future judicial cooperation between the EU and the UK, provided for in the newly applicable TCA. The human rights conditionality introduced by the TCA, and the new government mechanism established to enforce it, aim to ascertain continuous cooperation between the EU and the UK without additional guarantees on adequate human rights protection despite Brexit. The argument is that instead of mutual trust, the UK's continuous adherence to the ECHR will become the guiding principle when it comes to the observation of fundamental rights in judicial cooperation. The findings indicate that in the future the ECtHR may have an increasing role in determining the required level of protection of fundamental rights.

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I. INTRODUCTION

I.1 Mutual Trust in the EU's Area of Freedom, Security and Justice

Establishment of the EU's Area of Freedom, Security and Justice (AFSJ) is a continuation of the extensive cooperation among the Member States in several policy areas.² A key feature of the development of the AFSJ has been the abolition of internal borders between the Member States.³ However, even where the treaties provide a European area where freedom of movement is secured, it is not accompanied by a single area of law.⁴ The law remains territorial especially in the field of law enforcement and thus stands the challenge of maintaining a unite, single and effective Union legal system while respecting the sovereignty of the Member States. Additionally, EU law is characterised by its primacy and by the direct effect of a whole series of provisions applicable to their nationals and the Member States themselves.⁵

This is where the principle of mutual trust and mutual recognition comes in. Originated from the EU internal market, the principle⁶ of mutual trust between the Member States allows an area without internal borders to be created and maintained. Briefly, the principle of mutual trust requires each of Member States 'save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'⁷. The existence of such mutual trust is justified by and based on a fundamental premiss that 'each Member State shares with all the other Member States, and recognises that they share with it, a set of common values [enshrined in Article 2 TEU] on which the EU is founded'⁸. The principle thus serves the function of effective judicial cooperation between the Member States, enabling national decisions to be enforced automatically, except in exceptional circumstances.⁹ Such automaticity ceases in case of 'systematic deficiencies'¹⁰ or where a judicial authority of the executing Member State is in possession of evidence of real risk of inhuman or degrading treatment.¹¹

² Francesco Maiani, 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(1) CML Rev, 11.

³ Valsamis Mitsilegas, *EU Criminal Law after Lisbon – Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing 2016) 125.

⁴ *Ibid.*

⁵ Opinion 2/13 *Adhésion de l'Union à la CEDH* [2014] ECLI:EU:C:2014:2454, para 166.

⁶ The notion of 'principle' can raise criticism and rightfully so. Francesco Maiani and Sara Migliorini question whether the principle of mutual trust created by the Court can be self-standing and applicable as such to all the AFSJ instruments. *One Principle to Rule them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice* [2020] 57(1) CML Rev, 44.

⁷ Opinion 2/13 *Adhésion de l'Union à la CEDH* [2014] ECLI:EU:C:2014:2454, para 191.

⁸ *Ibid.*, para 168.

⁹ Herlin-Karnell observes that the 'notion of trust [in the AFSJ] has, in many ways, worked as claimed panacea for a lack of uniformity'. Ester Herlin-Karnell, *The Constitutional Structure of Europe's Area of Freedom, Security and Justice' and the Right to Justification* (Hart Publishing 2019) 147.

¹⁰ Joined cases C-411 & 493/10 *N.S.* [2011] ECLI:EU:C:2011:865, para 100.

¹¹ Joined cases C404 & 659/15 *PPU Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:140, para 88.

1.2 Who Can Be Trusted Then?

If the membership of the Union guarantees¹² the mutual respect of fundamental rights, does it mean that any state may no longer be trusted if they choose to leave the EU? Following the UK-wide referendum in June 2016 and prolonged withdrawal process after the invoking of Article 50 TFEU on the UK's side, the Withdrawal Agreement¹³ between the UK and the EU entered into force on 31 January 2020. During the transition period, EU law continued to apply with respect to the UK,¹⁴ and the Court of Justice of the European Union (the Court) continued to have jurisdiction to hear disputes brought by or against the UK.¹⁵ Herewith, the presumed existence of mutual trust should not have been called into question – at least in principle.

At the end of last year, on Christmas Eve 2020, the EU and the UK agreed on the Trade and Cooperation Agreement (TCA)¹⁶ which was initially applied provisionally prior to its entry into force.¹⁷ After obtaining the consent of the European Parliament, the Council adopted a decision¹⁸ on the conclusion of the TCA and the agreement formally entered into force on 1 May 2021. Unlike free trade agreements in general, the agreement in question includes a whole set of provisions concerning law enforcement and judicial cooperation in criminal matters.

This article aims to answer the question whether mutual trust exists after Brexit and whether it plays any role in the future criminal cooperation between the EU and the UK. To answer the question, this article examines the legal basis, parameters, and conditions for future judicial cooperation, provided for in the TCA.

12 The purpose of this text is not to examine the observation or any alleged or suspected infringements of the fundamental rights in the Member States to the EU.

13 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 C1384/1.

14 Article 127 Withdrawal Agreement. Article 6(1) Withdrawal Agreement stipulates that 'all references in this Agreement to Union law shall be understood as references to Union law, including as amended or replaces, as applicable on the last day of the transition period'.

15 Article 86(1) Withdrawal Agreement.

16 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 [2020] OJ L444/14.

17 Council decision 13904/29 on the signing, on behalf of the Union, and on provisional application of 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, 28 December 2020 <<https://data.consilium.europa.eu/doc/document/ST-13904-2020-INIT/en/pdf>>.

18 Council decision 5022/3/21 on the conclusion, on behalf of the Union, of 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, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, 28 April 2021 <<https://data.consilium.europa.eu/doc/document/ST-5022-2021-REV-3/en/pdf>>.

2. CONCERNS PRIOR TO BREXIT

2.1 The RO Judgement: Potential Impacts of Expected Brexit Concerned

Already prior to Brexit, there has been legal debate on the consequences of the UK potentially leaving the EU, particularly regarding the principle of mutual trust and mutual recognition. The Court's ruling in the case C-327/18, *RO*,¹⁹ concerned whether Ireland was still obliged to execute a European Arrest Warrant (EAW) issued by the UK, in light of the UK's expected withdrawal from the EU. In March 2017, the UK had notified its intention to leave on the basis of Article 50 TFEU. Worth emphasising, at the time of the preliminary reference, the provisions of the Withdrawal Agreement were not yet agreed upon and, thus, the continuing application of EU law during the transition period remained unsettled. As the following negotiations between the EU and the UK have had similar elements to the findings of the Court, it is worth taking a closer look at the *RO*.

In brief, RO was subject to two EAW's, issued by the UK relating to murder, arson, and rape. Those crimes each carried potential sentences of life imprisonment. RO was arrested and remanded in custody in Ireland, where he challenged the execution of the warrants claiming that he could suffer inhuman and degrading treatment if he were to be imprisoned in Maghaberry prison in Northern Ireland. In light of *Aranyosi and Căldăraru*²⁰, the Irish High Court considered it necessary to ask for further information from the issuing judicial authority on the conditions of RO's detention. Satisfied with the reply, the Irish High Court, however, was still concerned about the potential impacts of Brexit on RO's case and thus referred the question to the Court seeking, in essence, to ascertain whether Brexit would have any impact on executing an EAW.

The Court replied in the negative. The Court recalled that the principle of mutual trust between the Member States requires (save in exceptional circumstances) to consider all the other Member States to be complying with EU law and particularly with the fundamental rights. However, since RO argued that due to the UK's notification, he would be exposed to the risk that number of the rights he enjoys under the Charter²¹ and the Framework Decision²² may no longer be respected after the UK's withdrawal, the Court had to consider the potential impacts of the notification based on the Article 50 TFEU. In that respect, the Court noted that such notification does not have the effect of suspending the application of EU law in the withdrawing state.²³ Instead, a refusal to execute an EAW would run counter to the preamble of the Framework Decision which states that its implementation may only be suspended in the event of a serious

19 Case C-327/18 PPU *RO* [2018] ECLI:EU:C:2018:733.

20 Joined cases C-404/15 & 659/15 PPU [2016] ECLI:EU:C:2016:198.

21 Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

22 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190, amended by Council Framework Decision of 26 February 2009 (2009/299/JHA) [2009] OJ L81.

23 Case C-327/18 PPU *RO* [2018] ECLI:EU:C:2018:733, para 45.

and persistent breach of the EU values.²⁴ Moreover, notification of intention to withdraw from the EU did not constitute ‘exceptional circumstances’.

To further assurance, should the UK indeed leave the EU, the Court observed that since the UK would remain a party to the ECHR irrespective to its membership to the EU, its withdrawal from the Union ‘has no effect on its obligation to have due regard to Article 3 of the ECHR, to which Article 4 of the Charter corresponds, and, consequently, cannot justify the refusal to execute a European arrest warrant on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions.’²⁵ In conclusion, non-execution may be justified only if there is ‘concrete evidence to the contrary’.²⁶

2.2 Conclusions and Implications

The *RO* judgement suggested that the adoption of Brexit would not change much. Even where the provisions of the Withdrawal Agreement remained unsettled at the time of the judgement, an assumption of the UK nevertheless continuing to apply the ECHR amounted to the necessary mutual trust.²⁷ Accordingly, the UK’s continuing adherence to the ECHR was to form a part of the ongoing future relationship negotiations as reflected in the revised EU–UK Political Declaration. As for the basis for cooperation, ‘the future relationship should incorporate the United Kingdom’s continued commitment to respect the framework of the [ECHR], while the Union and its Member States will remain bound by the [Charter], which reaffirms the rights as they result in particular from the ECHR.’²⁸ Since the EU itself has not yet acceded to the ECHR,²⁹ the divergent positions of the parties raised some criticism, especially since such requirement is unprecedented when compared to the EU’s third country agreements with other states.³⁰

24 *Ibid.*, para 47.

25 *Ibid.*, para 52.

26 *Ibid.*, para 61.

27 In addition to the continuous application of the ECHR (Article 3 particularly), since the provisions of Article 27 and 28 of the Framework Decision, reflected in Articles 14 and 15 of the European Convention on Extradition of 13 December 1957 that is signed by the UK, and the right to a deduction (Article 26 of the Framework Decision) are incorporated in UK domestic law and, thus, applicable irrespective of the EU law, the execution of the EAW was justified.

28 3 Part I: Initial provisions. <https://ec.europa.eu/info/sites/info/files/revised_political_declaration.pdf>.

29 Despite the CJEU’s surprising – or disappointing – ruling (Opinion 2/13), the EU’s accession process was restarted in 2019. Lucy Moxham and Oliver Garner find the EU’s accession to the ECHR necessary for the EU in order to enhance its credibility and to ensure a coherent European framework for the protection of human rights. “Will the UK uphold its commitment to human rights?” (LSE blog, 30 June 2020) <<https://blogs.lse.ac.uk/brexit/2020/06/30/long-read-will-the-uk-uphold-its-commitment-to-human-rights/>> accessed 5 February 2021.

30 Harriet Harman MP, Chair of the Joint Committee on Human Rights, Views on the EU mandate for negotiations with the UK on the future relationship, 20 April 2020, <<https://committees.parliament.uk/publications/747/documents/4376/default/>> accessed 5 February 2021.

3. HUMAN RIGHTS CONDITIONALITY FOR THE FUTURE COOPERATION BETWEEN THE EU AND THE UK

3.1 General Basis for Cooperation

The newly applicable TCA aims to create a strong linkage to the fundamental rights by introducing a human rights conditionality for the cooperation between the EU and the UK. Part Six of the TCA sets the basis of cooperation, providing that

‘The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and *the international human rights treaties to which they are parties.*’³¹

Since the UK is party to the ECHR, it, therefore, falls within the meaning of the Article COMPROV.4 without explicit notion. Further, Article COMPROV.12 provides that democracy, rule of law and human rights constitute ‘essential elements’ of the partnership. In case of serious and substantial failure by one of the parties in fulfilling the obligations concerning essential elements, the TCA or any supplementing agreement may be terminated or suspended from operation either in whole or in part.³² The suspension or termination is not however automatic, since parties are obliged to seek a mutually agreeable solution and there is an obligation of proportionality.³³

3.2 The ECHR as a Prerequisite for Law Enforcement Cooperation

The context of mutual trust is particularly relevant in the judicial cooperation in criminal matters which is comprised in Part Three³⁴ of the TCA. Reflecting the general basis for cooperation, Article LAW.GEN.3 guarantees the protection of human rights and fundamental freedoms introducing its own variation of the ‘essential elements’ -clause.³⁵ Unlike the general provisions, Article LAW.GEN.3 provides an explicit reference to the ECHR and is worth citing in full.

31 Article COMPROV.4 of the TCA (Title II: Basis for Cooperation), emphasis added.

32 Article INST.35 of the TCA (Title III: Fulfillment of Obligations and Safeguard Measures).

33 Steve Peers, “Analysis 3 of the Brexit Deal: Human Rights and the EU/UK Trade and Cooperation Agreement” (EU Law Analysis, 4.1.2021), <<https://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>> accessed 7 February 2021.

34 Part III: Law Enforcement and Cooperation in Criminal Matters, TCA. Note that cooperation in civil matters is not covered.

35 Steve Peers, “Analysis 3 of the Brexit Deal: Human Rights and the EU/UK Trade and Cooperation Agreement” (EU Law Analysis, 4.1.2021), <<https://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>> accessed 7 February 2021.

'1. The cooperation provided for in this Part is based on the Parties' and Member States' longstanding respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the *European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically*.

2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.' (emphasis added)

The notion on the importance of giving effect to the ECHR provisions hence ensures that the corresponding rights of the Charter are secured also in the future in cases like *RO*. As the derogation from Article 4 of the Charter has served as justification for non-execution,³⁶ so would any deprivation from Article 3 ECHR, if the effect to the Convention rights was not guaranteed in the UK's domestic legal system.

Regardless of whether the rest of the treaty remains in force, law enforcement cooperation is ceased if the UK withdraws from the ECHR.³⁷ Part Three of the TCA hence includes its own 'human rights termination clause' dependent on the application of the ECHR: should the UK or any of the Member States denounce the ECHR or Protocols 1, 6, or 13 thereto³⁸, the part concerning law enforcement and judicial cooperation in criminal matters ceases to be in force, after such denunciation becomes effective, on the fifteenth day following the notification of termination.³⁹ Unlike the essential elements -clause concerning the whole TCA, here, there is no requirement of a serious and substantial failure or to discuss the issue, nor is there an obligation of proportionality.

Observation of fundamental rights as a prerequisite for judicial cooperation in criminal matters is further amplified in Article LAW.OTHER.137(1), which provides for the *suspension* of Part Three of the agreement in the event of serious and systematic deficiencies as regards the protection of fundamental rights or the principle of the rule of law. The 'serious and systematic

36 Joined cases C404 & 659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:140, para 104.

37 Frederick Cowell notes that while the TCA contains a number of provisions 'locking-in' the UK's continued adherence to the ECHR, the implications of broader non-compliance remain unclear. "The Brexit deal locks the UK into continued Strasbourg Human Rights court membership" (LSE blog, 17.1.2021), <<https://blogs.lse.ac.uk/brexit/2021/01/17/the-brexit-deal-locks-the-uk-into-continued-strasbourg-human-rights-court-membership/>> accessed 7 February 2021.

38 Regarding the supplementing Protocols to the ECHR, Protocol 1 concerns the protection of property as well as the right to education and free elections, while Protocols 6 and 13 both concern abolition of the death penalty.

39 Article LAW.OTHER.136(2) of the TCA.

deficiencies' formula seems to emigrate from *Bosphorus*⁴⁰ and the suspending effect to reflect the findings of *Avotiņš v Latvia*⁴¹: if a serious and substantiated complaint is raised before the executing court to the effect that the protection of an ECHR right has been manifestly deficient (and this situation cannot be remedied by EU law), the court cannot refrain from examining such complaint on the sole ground that EU law is applied.⁴² As we apply this to EU-UK-relation, if the presumption needs to be set aside, also the cooperation in criminal matters needs to be suspended until the trust, reflecting the mutual trust between the Member States,⁴³ is regained.

3.3 Special Human Rights Exceptions⁴⁴

Part Three of the TCA also contains a number of specific human rights provisions relating to specific forms of law enforcement cooperation.⁴⁵ For instance, the surrender mechanism established by the TCA provides that, in particular cases, the execution of an arrest warrant may be subject to guarantees given by the issuing State. Thus, the executing judicial authority may require additional guarantees as to the treatment of the requested person after the surrender before it decides whether to execute the arrest warrant if, *inter alia*, there are 'substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person'.⁴⁶

Thus, Article LAW.SURR.84(c) seems to be in line with the exceptions and limitations to the mutual recognition in executing the EAWs. While the Court has in its case-law set a rather high threshold for the non-operation of the principle of mutual trust,⁴⁷ here, substantial grounds for real risk serve the justification to verify the observance of fundamental rights. Noteworthy, as recalled in *RO*, implementation of the Framework Decision can only be suspended in the event of a serious and persistent breach of the EU values.⁴⁸

40 *Bosphorus* App no 45036/98 (ECtHR, 30 June 2005).

41 *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016).

42 *Ibid.*, para 116.

43 Koen Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust* [2017] 54(3) CML Rev, 836.

44 A phrase used by Steve Peers, in "Analysis 3 of the Brexit Deal: Human Rights and the EU/UK Trade and Cooperation Agreement" (EU Law Analysis, 4.1.2021), <<https://eulawanalysis.blogspot.com/2021/01/analysis-3-of-brexit-deal-human-rights.html>> accessed 7 February 2021.

45 *Ibid.* Articles LAW.SURR.84(c), LAW.CONFIC.16 and LAW.EUROPOL.52(3) of the TCA.

46 Article LAW.SURR.84(c) of the TCA.

47 See, e.g., Joined cases C-411 & 493/10 N.S. [2011] ECLI:EU:C:2011:865, C-578/16 PPU C.K. [2017] ECLI:EU:C:2017:127, Joined cases C404 & 659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:140.

48 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) [2002] OJ L190, amended by Council Framework Decision of 26 February 2009 (2009/299/JHA) [2009] OJ L81, Preamble (10).

4. NEW INSTITUTIONALISM

4.1 If the ECHR Is the Solution, What Is the Problem?

After all, when it comes to mutual trust, the ECHR conditionality in the TCA ensures that the ECHR will be at the heart of the EU–UK criminal justice cooperation, although the conditionality may seem tenuous to some.⁴⁹ If the presumption of equivalent protection was to be rebutted, the interest of international cooperation would be outweighed by the ECHR's role as a 'constitutional instrument of European public order' in the field of human rights.⁵⁰ Bell argues that, in light of Part Three of the TCA, *Bosphorus* provides a wider context to ECHR conditionality in respect of the UK.⁵¹ Setting the ECHR as a centrepiece is, however, unlikely to soothe the tensions entrenched in Opinion 2/13 – what about the autonomy of the EU legal order *vis-à-vis* the ECHR?⁵²

4.2 New Governance and Interpretation

Additionally, the TCA establishes a whole new governance ecosystem.⁵³ The envisaged agreement sets a range of Committees and Working Groups and encourages a limited degree of parliamentary cooperation, but this text focuses mainly on the (special) governance mechanisms on law enforcement and criminal justice cooperation. First and foremost, the TCA establishes a new Partnership Council, comprised of ministerial-level representatives of the EU and the UK. The Partnership Council oversees the attainment of the objectives of the TCA, supervising and facilitating its interpretation and application. Moreover, both the UK and the EU may refer any issue relating to the implementation, application, and *interpretation* of the TCA to the Partnership

Council.⁵⁴ The Partnership Council attains a wide range of powers as it has powers to adopt decisions where the TCA so provides and amendments to the TCA itself.⁵⁵

The TCA also establishes a Specialised Committee on Law Enforcement and Judicial Cooperation (Specialised Committee) to address the matters covered by Part Three.⁵⁶ In place of law enforcement cooperation, the Specialised Committee has the power to monitor and review the implementation of the agreement and to assist the Partnership Council, for instance, by recommending joint interpretations in the event of suspension of Part Three of the TCA.⁵⁷

With regard to interpretation, the TCA is an international treaty and thus must be interpreted in accordance with customary rules of interpretation of public international law (Article COMPROV.13). The TCA provides an explicit reference to the Vienna Convention on the Law of Treaties⁵⁸ and hence a toolbox of the general rules on the interpretation of treaties.⁵⁹ Therefore, interpretation of the TCA is not to be governed by the EU principles of interpretation developed by the Court nor to be carried out by the EU courts.⁶⁰ 'For greater certainty', the TCA confirms that it does not create an obligation to interpret the provisions in accordance with domestic law nor are interpretations given by the Court or the UK courts binding on each other.⁶¹

4.3. Dispute Settlement

Under the TCA, potential disputes should primarily be resolved through political consultations between the parties.⁶² If the parties do not agree, either side may initiate arbitration.⁶³ However, the rules on dispute settlement exclude issues relating to law enforcement and judicial cooperation in criminal matters, including when applied in relation to situations governed by other provisions of the TCA, from the scope of arbitration.⁶⁴ Overall, despite the rather extensive

49 John Bell, "New year, new relationship – bespoke governance and tenuous ECHR conditionality in Part 3 of the EU-UK TCA" (European Law Blog, 12.1.2021) <<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 7 February 2021.

50 *Bosphorus* App no 45036/98 (ECtHR, 30 June 2005), para 156.

51 John Bell, "New year, new relationship – bespoke governance and tenuous ECHR conditionality in Part 3 of the EU-UK TCA" (European Law Blog, 12.1.2021) <<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 7 February 2021.

52 In Opinion 2/13 (*Adhésion de l'Union à la CEDH* [2014] ECLI:EU:C:2014:2454), the Court found three situations where the accession of the EU to the ECHR could endanger the autonomy of EU law. Firstly, the Court concerned the potential divergent standards on the protection due to the conflict between Article 53 ECHR and Article 53 Charter (paras 187–190). Secondly, the draft agreement could adversely affect the principle of mutual trust between the Member States concerning the respect of fundamental rights (paras 191–195). Thirdly, the Court questioned the possibility of the national courts to ask an advisory opinion from the ECtHR since such mechanism, established by Protocol No. 16 to the ECHR, could undermine the effectiveness of the preliminary reference procedure (paras 196–199).

53 Mark Konstantinidis, Vasiliki Poula, "From Brexit to Eternity: The institutional landscape under the EU-UK Trade and Cooperation Agreement" (European Law Blog, 14.1.2021) <<https://europeanlawblog.eu/2021/01/14/from-brexit-to-eternity-the-institutional-landscape-under-the-eu-uk-trade-and-cooperation-agreement/>> accessed 8 February 2021.

54 Article INST.1(3) of the TCA.

55 Article INST.1(4) of the TCA.

56 Article INST.2(1)(r) of the TCA.

57 Article INST.2(4) and Article LAW.OTHER.137(7) of the TCA.

58 Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980. United Nations *Treaty Series*, vol. 1155, p. 331.

59 Jan Philipp Cludius notes that as the EU is not a State, the VCLT does not apply to the TCA as such. Only the customary rules reflected in the VCLT may be applicable to the TCA. "Chaos averted or executive overreach?: On the provisional application of the "EU-UK Trade and Cooperation Agreement" (Völkerrechtsblog, 15.1.2021) <<https://voelkerrechtsblog.org/chaos-averted-or-executive-overreach/>> accessed 4 February 2021. Yet, the customary nature of the provisions relating to the treaty interpretation is undisputed. See, e.g., *Territorial Dispute* (Merits) [1994] ICJ Rep 1994 p. 6 and *Oil Platforms* (Preliminary Objections) [1996] ICJ Rep 1996 p. 803.

60 Philip Moser QC, "The TCA: New Law, Not EU Law" (EU Relations Law, 21.12.2020) <<https://eurelationslaw.com/blog/the-tca-new-law-not-eu-law>> accessed 6 February 2021.

61 Article COMPROV.13 of the TCA.

62 Article INST.13 of the TCA.

63 Article INST.14 of the TCA.

64 Article INST.10(2)(f) of the TCA.

arbitration provision, there is a strong preference in favour of political consultations, and, in certain areas, these consultations are indeed the only available solution.⁶⁵

Termination or suspension of judicial cooperation, as discussed above alongside the human rights conditionality, is achieved through written notification through diplomatic channels. Upon the notification of a suspension (Article LAW.OTHER.137) the Partnership Council needs immediately be seized of the matter, as it has the obligation to explore ways to postpone, withdraw or reduce the scope of suspension.⁶⁶ Further, in accordance with the powers conferred to it and assisted by the Special Committee, the Partnership Council performs interpretative functions concerning the provisions of Part Three. The Partnership Council may also recommend appropriate actions or adopt appropriate adaptations which would be necessary in order to address the underlying reasons for the suspension. Even when the fundamental rights are at issue, it is to the Partnership Council to interpret and, if necessary, amend the provisions. This raises the question of whether it is appropriate to assess, for instance, the meaning of 'serious and systematic deficiencies' of the protection of fundamental rights in diplomatic *tour de table* instead of a courtroom. When the judicial cooperation in criminal matters is based on the prerequisite that both Parties observe the fundamental rights, it would seem more natural for the court to assess such a finding or alleged breach.

4.3 The Role of the Court

Shortly, the Court will have no role in the institutional structure of the TCA. This is rather surprising since the TCA is an international agreement concluded by the EU⁶⁷ and by virtue of Article 216(2) TFEU binding upon the institutions of the EU and on its Member States. Such an agreement forms 'an integral part of EU law' where only the Court has exclusive jurisdiction in disputes where EU law is at issue.⁶⁸ The draft agreement contained a provision guarding the autonomy of the EU legal order as the concepts of EU law were to be interpreted in accordance

65 Mark Konstantinidis, Vasiliki Poula, "From Brexit to Eternity: The institutional landscape under the EU-UK Trade and Cooperation Agreement (European Law Blog, 14.1.2021) <<https://europeanlawblog.eu/2021/01/14/from-brexit-to-eternity-the-institutional-landscape-under-the-eu-uk-trade-and-cooperation-agreement/>> accessed 8 February 2021.

66 Article LAW.OTHER.137(7).

67 Article 217 TFEU was chosen as a legal basis for the agreement ('association agreements'). The Council legal services confirmed its view that "as [TCA] only covers areas where the EU has competence, whether exclusive or potential, the [TCA] may be concluded as an EU-only agreement on the basis of Article 217 TFEU". CLS opinion 5591/21 (25 January 2021). Steve Peers, "The Brexit deal – Council legal service opinion" (EU Law Analysis, 27 January 2021) <<http://eulawanalysis.blogspot.com/2021/01/the-brexit-deal-council-legal-service.html?m=1>> accessed 8 February 2021.

68 Opinion 2/13 *Adhésion de l'Union à la CEDH* [2014] ECLI:EU:C:2014:2454, paras 180, 204.

with the Court's case-law.⁶⁹ This did not, however, make it to the TCA, explicable in view of the UK's 'red line' in relation to the status of the Court and EU law.⁷⁰

As such, concerning the TCA, the Court's jurisdiction is limited only to matters related to the UK's participation in Union programmes.⁷¹ It remains to be seen whether EU law concepts will have de facto effect with regard to interpretation of the TCA. As most of the EU instruments are replicated in the TCA in the part concerning law enforcement and judicial cooperation in criminal matters, EU law might be used as a benchmark when interpreting the provisions of the agreement. Thus, the Court and its case law might serve as a persuasive authority despite its non-binding status.

5. THE (UNPREDICTABLE) FUTURE OF THE MUTUAL TRUST

Although law enforcement cooperation⁷² on the basis of the TCA is not fully comparable to the criminal justice cooperation afforded by EU membership, the surrender mechanism⁷³ is an example of the compromises extended to human rights in order to achieve cooperation as close as conceivable.⁷⁴ The TCA itself is a major political compromise in order to avoid a no-deal Brexit and it remains to be seen what the cooperation will eventually be like within the institutional framework established by the agreement. When it comes to the observation of fundamental rights in judicial cooperation in criminal matters, it is not yet clear how a diplomatic forum (the Partnership Council, a political compromise too) can take on the interpretative tasks expected

69 Draft text of the Agreement on the New Partnership with the United Kingdom, 18 March 2020 (UKTF (2020) 14), Article COMPROV.14 <<https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf>>.

70 Philip Moser QC, "The TCA: New Law, Not EU Law" (EU Relations Law, 21.12.2020) <<https://eurelationslaw.com/blog/the-tca-new-law-not-eu-law>> accessed 6 February 2021.

71 Article UNPRO.4.4 of the TCA.

72 In addition to extradition, TCA covers cooperation in transfers of data on DNA, fingerprints, vehicle registration, passenger name records, exchange of operational information, cooperation with Europol and Eurojust, transfer of evidence, money laundering, and freezing and confiscation measures.

73 The three main differences with the EAW are the possibility for non-execution of warrant for political offences, the refusal to surrender own nationals in certain conditions and the requirement of 'dual criminality'.

74 John Bell, "New year, new relationship – bespoke governance and tenuous ECHR conditionality in Part 3 of the EU-UK TCA" (European Law Blog, 12.1.2021) <<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 7 February 2021.

of a judicial body.⁷⁵ The 'roll-over' for EAW's is already in the pipeline,⁷⁶ as the UK courts have considered how cases live on the exit day should be dealt with.⁷⁷

The choice of dispute settlement mechanisms, or more precisely, the exclusion of the Court, raises the question of whether the EU could then also access to the ECHR. After its entry into force, the TCA forms a part of EU law, yet excluded from the ultimate jurisdiction of the EU courts – something that seemed very unacceptable to the Court in Opinion 2/13. However, the provisions of the TCA emphasise 'for greater certainty' that agreement remains a creature of pure international law and thus, its interpretation ought not to be the interpretation of EU law,⁷⁸ unlike the ECtHR's interpretation of ECHR rights corresponding to the Charter. The ECHR draft accession agreement⁷⁹ and the TCA may thus not be fully comparable.

The ECHR conditionality should assure any worrisome executing judicial authority on the observance of fundamental rights and hence ensure the effective judicial cooperation in extradition matters without additional guarantees, in accordance with the mutual trust. However, in the end, it is to the government mechanism established to enforce it to prove the value of such conditionality. The TCA emphasises *the importance of giving effect to the ECHR rights domestically*, which naturally obliges to consider the future role of the European Court of Human Rights (ECtHR) too. It is therefore to the ECtHR to assess the effect of ECHR rights in the UK domestic legal system and the level of protection provided therein. Thus, in case of corresponding rights, the ECtHR may also indirectly determine the level of protection required from the Member States by the Charter and accordingly, define the limits of *'raison d'être of the European Union'*⁸⁰ – the principle of mutual trust.

75 *Ibid.*

76 John R. Spencer, Criminal Justice Measures – TCA Part III. The Trade and Co-operation Agreement: Central Legal Issues, UKAEL webinar 16 February 2021.

77 *Polakowski et al v Westminster Magis et al* [2021] EWHC 53 (Admin). Available <<https://www.bailii.org/ew/cases/EWHC/Admin/2021/53.html>>.

78 Philip Moser QC, "The TCA: New Law, Not EU Law" (EU Relations Law, 21.12.2020) <<https://eurelationslaw.com/blog/the-tca-new-law-not-eu-law>> accessed 6 February 2021. "Thus it may well be the case that the UK Government was not in fact the only Party wishing to ensure that the TCA was outwith the orbit of EU law."

79 Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms [2013] (47+1(2013)008rev2), Appendix I.

80 Joined cases C-411 & 493/10 N.S. [2011] ECLI:EU:C:2011:865, para 83.