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Transatlantic Relations and post-Brexit EU-UK security

Elaine Fahey

Transatlantic relations form an intricate but perhaps surprisingly insightful place to begin reflection upon UK-EU security going forward. Arguably, the Brexit negotiations and preparations of EU 27 in published EU 27 documentations (2018) indicate the US as a privileged partner of the EU, perhaps enjoying a first-among-equals or *primus inter pares* status, one which the UK may eventually aspire to. Defining 'internal' 'security' in the post-Brexit era may be significantly less 'internal' and less 'secure' / about security- or more about the external and securitised civil and criminal justice. A fundamental question for resolution going forward in the post-Brexit era will in fact probably concern the depth of the effects of the 'external' upon the 'internal' and the separability of security from defence, foreign policy and justice.

Brexit has exposed many other elementary questions and one acutely thorny feature of transatlantic relations, that of its lack of transparency. For example, a debate has opened up as to the disparity between the US State Department and EU Treaties Office on the definition of an agreement in transatlantic relations (Larik, 2017). The numerical content of the two respective entities varies dramatically as to how much law is precisely in force. Differences remain as to counting agreements not yet in force, consolidated, amended or altered, acts in trade and security and agreements annulled (e.g. as Passenger Name Records). It is an eye-opening exercise as to the transparency of transatlantic relations and the transparency of the rule of law between the two partners. This 'counting' exercise also heavily impinges upon the UK's capacity to perfectly replicate or grandfather laws, rules and standards here. No doubt significant rule of law and legitimacy expectations questions may ensue and the full scale of the challenges of deciphering these issues may arise in less than straightforward fashions or contexts (Larik, 2017).

More generally, transatlantic relations in the realm of justice and home affairs has operated as a vibrant source of law-making (Fahey, 2017). A huge proliferation of soft law in a diversity of fields has also been matched by a creeping institutionalisation in order to meet accountability, legitimacy and transparency considerations. For example, the EU-US Umbrella Agreement is a good example of recent EU-US criminal justice cooperation with a shift towards soft institutionalisation (Fahey, 2018). For example, the main accountability functions

of the Agreement are set out in the Article 14, which put an onus on authorities to do so appropriately or risk considerable sanctions. It strives to develop a system to facilitate claims in the event of misconduct and thus constitutes some form of looser localised ‘institutionalisation’ if it can be called that. These developments will be very difficult for a third country partner to replicate or grandfather to any degree barring participation.

Current EU-US Justice and Home affairs cooperation spans extradition, mutual legal assistance, passenger name records, financial messaging, the death penalty, cybercrime and security and information sharing. While all of these forms of cooperation have proven themselves to be useful diplomatic channels, sometimes merely legally replicating what was in existence at a bilateral level, at least three considerations threaten their existence going forward and in turn the UK’s capacity to either replicate, grandfather or participate therein (see negotiation positions, this volume, chapter 3). *Firstly*, existing EU-US JHA measures are still vulnerable to ECHR challenge, having largely remained free from scrutiny. The ratification of ECHR Protocol No. 16 by 10 EU Member State courts for ECHR advisory jurisdiction may generate further lines of scrutiny going forward into EU-ECHR law (Council of Europe Treaty Series, 2013). *Second*, existing EU-US JHA measures remain vulnerable to data protection challenges in the new post-*Schrems* (Court of Justice, 2015), GDPR, *Opinion 1/15* era (Court of Justice, 2017), of strict scrutiny of data transfer as a cross-cutting dimension of EU law in internal and external contexts. This era poses a significant brake upon the idea of UK diverging from EU law in any rights-based domain, arguably not limited to data protection. *Thirdly*, the era of rising significance of the ‘autonomy of EU law’ for the CJEU recently, particularly post-*Opinion 2/13* (Court of Justice, 2014) and *Achmea* (Court of Justice, 2018) is one, which threatens institutionalisation as a means to redress any of the foregoing. While the current red lines of the CJEU and its avoidance ideologically dominate all analysis, it is to be remembered that it impinges upon a deeper and more specialised relationship with the UK and formulations of good governance in the field of justice and security, which arguably may have an entirely different resonance to trade based considerations (see for example House of Lords, 2017).

Another significant factor, moving away from a court-centric view of EU law, is that the EU legislator has become an active and dynamic importer of external norms in its AFSJ in the post-Lisbon period (Fahey, 2016). These developments provide important evidence of socialisation of the EU at an international level. Notably, transatlantic relations stand apart as one of the few areas of the AFJS where external norms are absent therefrom, i.e. where the EU is not a norm

importer. Conversely, in the same time period, the CJEU has become increasingly devoted to the autonomy of EU law and its reification and has witnessed ceasing to cite external norms (e.g. in the area of external migration law) (Moreno Law, 2017: 462). Will the UK be so eager to de facto and de jure converge with international norms? These developments pose important reflection points for understanding rule-takers and rule-makers in the international legal order going forward. The exceptionalism of transatlantic relations is significant here and indicates that there are significant learning points here.

Looking forward, the draft Withdrawal Agreement (WA) (HM Government, 2018a) in its latest draft at the time of writing sets out in Part Four many important facets of the transition. During the transition period, the WA provides for the UK to become a rule-taker, where it no longer participates in the institutions of the EU and instead, continues to largely have the full force of EU law applied to it and is subject to the jurisdiction of the CJEU. In particular, Article 122 thereof provides for the scope of the transition to the effect that all EU law remains applicable to the UK during the transition period. Notably, it provides in Article 122(1)(a) that Protocol No. 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice is not applicable during the transition (in the sense that the UK will no longer have the option to request new opt-ins into AFSJ legislation),¹ removing the flexibility rights that has surrounded the UK's participation in this field. This opt-in opt-out right has been exercised consistently by the UK as to EU-US relations and has not hindered its capacity to lead policy. For example, in the field of Passenger Name Records, the UK has spearheaded the internal dimension to an EU policy (on PNR, a directive) (Fahey, 2013), initially conveyed of as an external relations policy domain. It affords a useful reflection point on becoming a rule-taker in UK-EU relations going forward and, dare one say, the potential insignificance of law in the realm of the transatlantic.

¹

[See Article 122 \(1\) \(a\) 'Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.](#)

[However, the following provisions of the Treaties and acts adopted by the institutions, bodies, offices or agencies of the Union shall not be applicable to and in the United Kingdom during the transition period:](#)

[\(a\) ... Protocol \(No 21\) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice...'](#)

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